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Supreme Court, U.S.
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JUN 8 1969
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1968 1969

No. 68-55

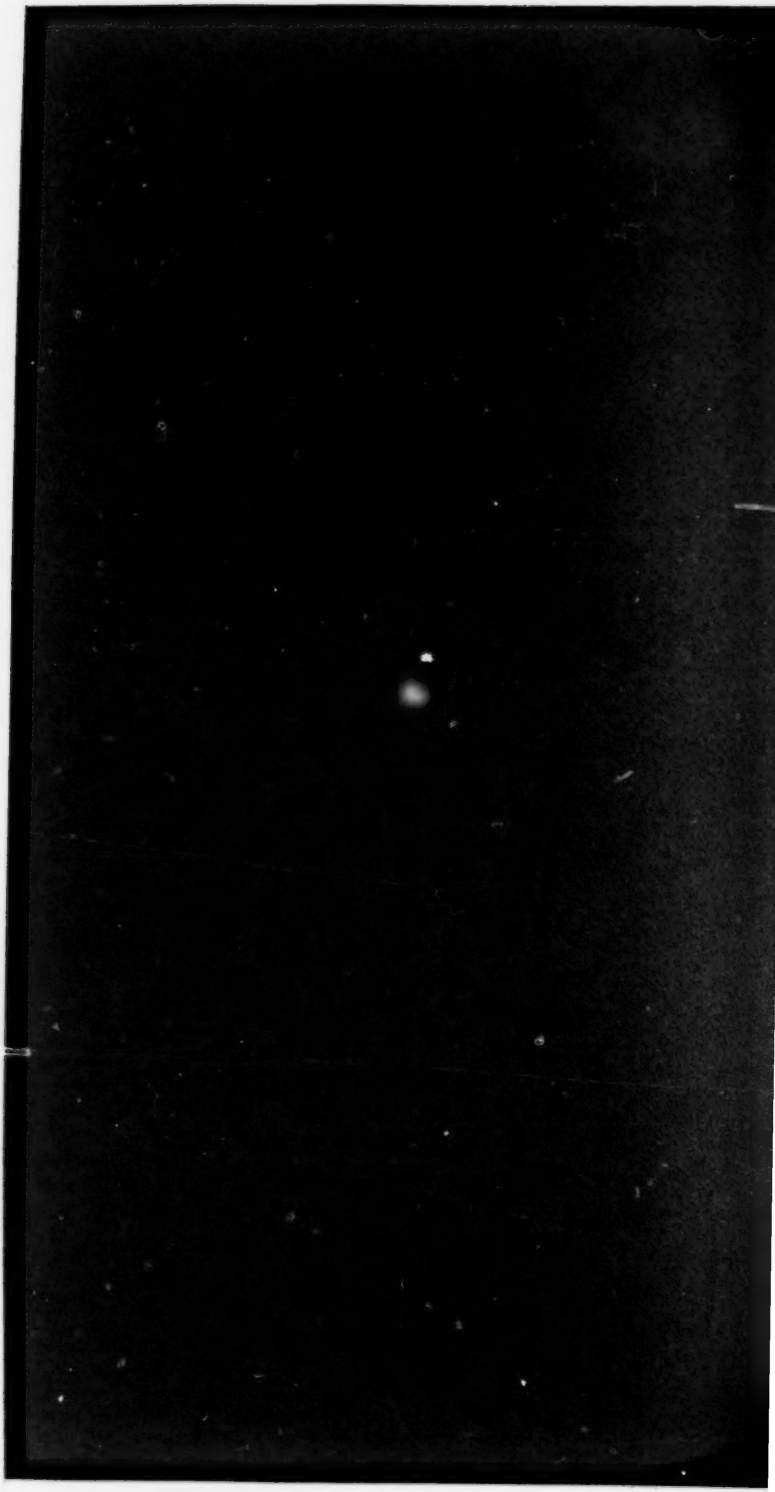
WILLIE WARE, JR., PETITIONER,

v.

GEORGE K. WILSON, WARDEN, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED JUNE 11, 1968
CERTIORARI GRANTED NOVEMBER 25, 1968



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1084

WILLIE WADE, JR., PETITIONER,

vs.

LAWRENCE E. WILSON, WARDEN, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[a] Docket Entries

November 30, 1966—Petition for habeas corpus delivered to United States District Court.

February 16, 1967 —Order issued allowing petitioner to file petition for habeas corpus in forma pauperis.

February 16, 1967 —Petition for habeas corpus filed with United States District Court.

February 16, 1967 —Order to show cause issued returnable February 24, 1967.

February 24, 1967 —Return to order to show cause filed.

March 6, 1967 —Order after hearing respondent, case continued to March 13, 1967, for further hearing on order to show cause.

March 8, 1967 —Motion of petitioner to stay proceedings filed.

March 22, 1967 —Traverse filed by petitioner to return to order to show cause.

June 5, 1967 —Order issued granting petition for writ of habeas corpus.

[b]

June 15, 1967 —Notice of appeal filed by respondent.

June 15, 1967 —Order issued staying execution of judgment pending appeal.

June 15, 1967 —Petition filed by respondent for certificate of probable cause.

June 15, 1967 —Certificate of probable cause issued.

March 11, 1968 —Decision of United States Court of Appeals for Ninth Circuit announced.

May 3, 1968 —Petitioner's petition for rehearing denied by United States Court of Appeals for Ninth Circuit.

[1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 46568

WILLIE WADE, JR., A-38671A, Plaintiff (Petitioner)

v.

LAWRENCE E. WILSON, WARDEN, and PEOPLE OF THE STATE OF CALIFORNIA, et al., Defendant (Respondent)

ORDER PERMITTING ACTION TO BE FILED IN FORMA PAUPERIS—February 15, 1967

Affidavit having been presented in compliance with the provisions of 28 U. S. C. 1915;

It is Ordered that the Clerk file said affidavit and the complaint or petition, without prepayment of the Clerk's filing fee, or the giving of security therefor.

It is Further Ordered that the question as to whether any further proceedings in this action may be taken at public expense, without prepayment of further fees and costs or giving security therefor, is hereby reserved for determination by a Judge of this Court.

It is Further Ordered that a copy of this order, together with a copy of the affidavit and complaint or petition filed pursuant hereto be served upon the defendant or respondent.

February 15, 1967.

Alfonso J. Zirpoli, United States District Judge.

[2] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Case No. 46568

[Title omitted]

PETITION FOR WRIT OF HABEAS CORPUS—
Filed February 16, 1967

PERSONS IN STATE CUSTODY

Instructions—Read Carefully

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall be set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the petition is taken in *forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, the *original and one copy* shall be mailed to the Clerk of the District Court for the Northern District of California, San Francisco, California.

[3] 1. Place of detention: San Quentin, State Prison.

2. Name and location of Court which imposed sentence: Superior Court of Los Angeles, California.

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) Murder in the First degree (p.c. 187).
(b)
(c)

4. The date upon which sentence was imposed and the terms of the sentence:

(a) November 1, 1960, Naterual life in prison.
(b)
(c)

5. Check whether a finding of guilty was made:

(a) after a plea of not guilty: A Finding of Guilty.
(b) after a plea of nolo contendre.
(c) after a plea of guilty.

6. If you were found guilty after a plea of not guilty, check whether that finding was made by:

(a) a jury Trial.
(b) a judge without a jury.

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes.

8. If you answered "yes" to (7), list:

(a) The name of each court to which you appealed:

I. District Court of Appeal 2d. app. Dist.
II. —.
III. —.

[4] (b) The result in each such court to which you appealed:

I. Judgement Affirmed.
II. —.
III. —.

(c) The date of each such result:

I. April 17, 1961.
II.
III.

(d) If known, citations of any written opinion or orders entered pursuant to such results:

I.

II.

III.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)

(b)

(c)

10. State concisely the grounds on which you base your allegations that you are being held in custody unlawfully:

(a) That i am being denied due process and Equal protection of the law by the State of California by the illegal retrainment of my Trial Records.

[5] (b)

(c)

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) The laws of California requires that an indigent person may recieve a free copy of a trial transcripts if he timely appeals, i complied with the law and timely appeal my conviction but could not recieve a free copy of the Records as an indigent person.

(b)

(c)

[6] 12. Prior to this petition have you filed with respect to this conviction:

(a) any petition in a State Court for relief from this conviction?

(b) any petitions in State or Federal Courts for habeas corpus? yes.

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.

(d) any other petitions, motions, or applications in this or any other court? yes.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

I. May 27, 1966 motion and affidavid for the issuance of records.
II. July 21, 1966, petition for a writ of Habeas Corpus.
III. —.
IV. —.

(b) the name and location of the court in which each was filed:

I. District Court of appeal 2d. App. Dist.
II. Supreme Court of the State of California.
III. —.
IV. —.

(c) the disposition thereof:

I. Denied without fileing.
[7] II. Denied without opinion.
III. —.
IV. —.

(d) the date of each such disposition:

I. District Court of appeal, May 27, 1966.
II. Supreme Court of California, Aug 17, 1966.
III. —.
IV. —.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

I. —.
II. —.
III. —.
IV. —.

14. Has any ground set forth in (10) been previously presented to this or any other court, State or Federal, in any petition, motion, or application which you have filed? yes.

15. If you answered "yes" to (14), identify:

(a) which grounds have been previously presented:

I. Denial of due process and equal protection of the law by the illegal restrainment of my trial transcripts by the people of the State of California.

[8] (b) the proceedings in which each ground was raised:

I. Supreme Court of the State of California.
II. —.
III. —.
IV. —.

16. If any ground set forth in said (10) has not previously been presented to any court, State or Federal, set forth the ground and state consicely the reasons why such ground has not been previously presented:

(a) —.
(b) —.
(c) —.

[9] 17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes.
(b) your trial, if any? yes.
(c) your sentencing? yes.
(d) your appeal, if any, from the judgment of conviction of the imposition of sentence? yes.
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? none.

18. If you answered "yes" to one or more of (17), list:

(a) the name and address of each attorney who represented you:

I. —.
II. —.
III. Burton Marks, 8447 Wilshire boulevard, Suits 217, Beverly Hill, Zipcode 90211.

(b) the proceedings at which each such attorney represented you:

I. —.
II. —.
III. —.

19. If you are seeking leave to proceed in *forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? yes.

Willie Wade, Jr., Signature of Affiant.

[10] UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

STATE OF CALIFORNIA,
County of Marin, ss:

FORMA PAUPERIS AFFIDAVIT

I, Willie Wade, Jr., petitioner in the above entitled cause, am an indigent person, and a citizen of the United States, over the age of twenty-one (21) years; that he is unable to prepay the fee of, or to file a petition for a writ of habeas corpus; and papers in support thereof, or to hire counsel to prosecute said writ; that he is without funds, or anything of value with which to pay or secure the cost necessary to prosecute said petition and the proceedings in connection therewith; that affiant believes he has a good and just cause of action, and therefore prays that this Court permit him to proceed in the above-entitled cause without pre-paying the costs required by this Court in such cases, and that security for same be waived by virtue of his indigent circumstances.

I certify under penalty of perjury that the foregoing is true and correct.

Willie Wade, Jr., Signature of Petitioner, Affiant.

STATE OF CALIFORNIA,
County of Marin, ss:

VERIFICATION

, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

Willie Wade, Jr., Signature of Affiant.

Date: November 23, 1966.

Subscribed and sworn to before me this 23 day of Nov, 1966. Winton A. Gastmann, Notary Public in and for the County of Marin, State of California.

My Commission expires December 30, 1968, Winton A. Gastmann.

[11] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. —

[Title omitted]

PETITION FOR A WRIT OF HABEAS CORPUS

To: The Honorable Justice of the Above entitled Court and associates thereof,

Comes now, Willie Wade, Jr, hereafter referred to as petitioner, in this matter, who says: that I am a citizen of the United States over the age of 21 years and that I am being illegally restrained, deprived of my liberity by the People of the State of California, in the actual custody of Lawrence E. Wilson, warden, et., al., respondents.

Jurisdiction

This Honorable Court has Jurisdiction invoked under the power and authority of the Constitution of the United States and conferred by Title 28 of the United States Code, sections: 1915; 2241; 2242; 2243 and 2254, to hear and determine all the matters herein,

[12] Allegations

Petitioner alleges that he is being denied due process of law and equal protection of the law by the restrainment of his records by the People of the State of California et., al.

Statement of the Facts and Statement of Case

In the Superior Court of the State of California, County of Los Angeles, petitioner was convicted by a jury for the crime of Murder, in the first Degree, a violation of California penal code, section 187, and as a penality for the crime, the jury found the prescribed punishment to be death.

Wherein the Honorable Court presiding over the case, after hearing and considering the evidence, found that the punishment to be that of Naterual life in prison, under

penal code sect. 1181.7, on a timely motion by counsel of record.

Thereafter petitioner appealed to the district court of appeal of the State of California, Second Appellate District, in case no. 7496.

The Appellate Court Affirmed the conviction of the Supreior Court of Los Angeles County, on August 17, 1961, and releived the court appointed counsel on his own request.

Thereafter, petitioner saught to use the records which were alleged to have been given to his co-defendant, who refuses to communicate on the subject, thus creating a conflict of interest, which has ended all communications.

The Superior Court informed petitioner that Mr. Burton Marks, or the Appellate Court had the records.

thereafter petitioner wrote Mr. Marks, attorney of record, seeking the transcript of the procedings, Mr. Mards, did not have such records, on May 6, 1966, (see Exhibit –A.).

Thereafter petitioner saught the transcripts through his relatives, they could not afford to pay for such records.

[13] Thereafter petitioner filed a formal motion for the issuence of the records to the district court of appeals seeking the same records, (see Exhibit—B.) which was returned by the Court Clerk, without being filed, and with a letter stating the Court has no way of reproducing the records, but the court has the records, (see Exhibit—C.).

Thereafter, petitioner filed a Writ of Habeas Corpus, to the Supreme Court of the State of California, on July 21, 1966, (Crime No. 10232,), which was denied August 17, 1966, (see Exhibit—D).

Thereafter, petitioner wrote a letter to the California Supreme Court, to test whether it was because of his lack of funds that the state would not issue him a copy of the records petitioner alleged that his financual position had changed and he wished to purcheas the records. On Sep. 22, 1966, the Court informed petitioner that such a request should be directed to the court which pocessed such records, naming the appellate court, (see Exhibit—E).

Petitioner wrote the same letter to the District Court of Appeal, on September 26, 1966, wherein the Clerk noted on the bottom of petitioners letter, that petitioner could secure the a reproducing firm to copy the records, the records could

be available and petitioner would have to pay the fee's, and the Superior Court would still have a copy of the record and that they might proform the service for a fee. (see Exhibit—F.), dated September 29, 1966.

Thereafter, petitioner wrote the Superior Court of Los Angeles County, requesting the records and alleging that he was able to pay for them, (the Records), thereafter, the Clerk respondent with a letter dated (October 24, 1966,) informing petitioner, that he could recieve the records if he had funds to pay for them, (see Exhibit—G.).

[14] Arguement and Points of Authority

The facts and the Exhibits here to attached to this petition and made apart of this arguement, support the position that petitioner is made to suffer an undue hardship, and that the state of california is practicing discrimination, thus petitioner moves this court in good faith to here and determine all matters setforth, and amend the sufferage imposed upon him, which is contrary to the constitutions both federal and state.

Petitioner alleged that he is being denied due process of law and equal protection of the law by the restrainment of his records by the people of the state of california, et., al.

Petitioner arguement is that the 14th Amendment of the constitution of the united states is violated by a state through the denials of due process of law and equal protection of the law, to citizens of the united states, and further. the above clause's of the 14th, Amendment, guarantee's the following protection afforded by the following Amendments:

(1) the *First Amendment* ". . . to petition the government for a redress of grevance."
(2) the *Eight Amendment* ". . . nor cruel and unusual punishment inflicted."
(3) the *Fourteenth Amendment,* Due Process of Law and Equal Protection of the laws, clauses.

Petitioner argues further that a denial of the Constitutionally guaranteed rights and privileges of the united states, to a prisoner, by the state requires relinguishment of all custody over the person of the prisoner. *Fay* v. *Noid.*

372 U.S. —, Townsend v. Sain, 372 U.S. —.

That inlight of the supporting facts and hereto attached exhibits: A, B, C, D, E, F, and G., petitioner is in custody inviolation of the United States Constitution.

[15] Those exhibits will show beyond doubt, that the state of california has effectively denied petitioner the right to have a free reporters transcrip as an indigent person, and to properly pursue a timely petition to the higher courts, that such restrainment of record's where a timely appeal has been filed and decided adversitly to petitioner, imposes an undue hardship and deprives petitioner of "the right to petition the courts for redress of greivence", which is a denial of the First (1st.) Amendment through the 14th Amendment to the United States Constitution, however the State of California, rule's conditionally hold that a hearing to the State Supreme Court, is at the discretion of that court, (see California Rules of Court, Rule 29 (a).

Thus the prerequisites of Title 2854 of the U.S.C. sect. 2254 becomes a henderence to a petitioner who seeks to challenage the illegallity of his conviction in federal courts, nontheless the state provides the State Supreme Court with Jurisdiction to entertain the writ of habeas corpus (see Article 6, sect. 4, of the Calif. Const.) but to the contrary the writ, or any other form of petitioning for redress of greavence cannot be effective or properly presented whitout the trial transcript's.

As the Court said in *Douglas* vs. *California*, 372 U.S. 353 "when an indigent is forced to run this gamlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure."

The present case holds an idenical position, that is petitioner should not be compelled to seek any extra-judical relief to to secure records where he has complied with the necessary rules of timely appealing to the State Appellate Court, to infuse such laws and not comply with them, is for a state to impose an extreme undue hardship and established "invidious discrimination" upon a prisoner (see *Williamson* vs. *Lee Optical Co.*, 348 U.S. 483, 489.), and as to the exact expression in *Douglas* vs. *California*, supra, ". . . while the indigent". . . . . "Already burdened by the preliminary [16] determination that his case is without merit, is forced to shift for himself."

However, it is impossiable to shift for himself, as petitioner cannot afford a transcript, but by both state and federal law he is entitled to a free transcript but cannot force his right in the state courts. "when society acts to deprive one of its members members of his life, liberity or properity, it takes most awesom steps, no general respect for, nor adherence to, the law as a whole can well be expected with judicial recognition of the paramount need for prompt, eminently fair and sober criminal procedures. The methods we employ in the enforcement of our criminal law have aptly been called the masure's by which the quality of our civilization may be judged." Cf. *Coppedge* vs. *United States*, 369 U.S. 438, 449.

In the case at bar the exhibits support and in their very essence express the continuation of a form of discrimination, and undue hardship to the indigents because they imply that it "Depends on the amount of money he has." *Griffin* vs. *Illinois*, 351 U.S. 12, at 19.

Very clearly now, *Griffin* vs. *Illinois*, supra, established the obligation of the State to funish a record of the proceedings to an indigent on appeal, nontheless, in the reply to petitioners Motion And Affidavid for the Issuance of Records, (see Exhibit—B) the Appellate Court proclaimed "*we have no way of reproducing the records.*"

Petitioner is inclined to *disbelieve* that statement, and views it as another *stumbling block*, thus the words of Mr. Justice Clark, disenting in *Douglas* vs. *California*, supra, looses their force where the Justice said "California furnishes the indigent a complete record . . ."

The basis of the present case holds that such denials of the fundimental process of adjudicating a cause, are prohibit by and inopposition to the Equal Protection Clause of the 14th Amendment, and inview of such direct denials petitioner has been subjected to a deprivation of justice which equals or supasses thos at the trial.

[17] Order and conformaty to the established rule's and law's of the State, by the State are mandentorary, obligatory, and compulsory upon the State, or relief from such denials are obligatory upon the Federal Courts by virture of the United States Constitution.

Petitioner's theory is supported in the revelently reasent ruling of the Supreme Court of the United States, in *Rinaldi*

vs. *Yeager*, No. 940 (1965) (Decided May 31, 1966). the court said:

"This Court has never held that the State's are required to establish avenues of Appellate review, once established, these avenues must be kept free of unreasoned distinctions that can only imped open and equal access to the Court's." (citing as follows)

Griffin vs. *California*, 351 U.S. 12;
Douglas vs. *California*, 372 U.S. 353;
Lane vs. Brown, 372 U.S. 477;
Draper vs. *Washington*,2 372 U.S. 487.

Accordingly, the right to petition the courts for redress of grievance, irrespectively to the grievance, that right exist within the basis of the American concept of justice and is binding on the adminstration of justice and fairness to all.

Petitioner hasa a limited knowledge of law both state and federal, but without the trial records even the most skilled lawyer could not establish a point of arguement and fact, thus, the cpmditions at present, the comdeming acts by the state in denying the records to petitioner is to establish a condition idenical to that of, *In Re: Chessman*, 44 C. 2d 1, (279 P. 2d 24) (Dessent)

"It would be just as reasonable to place shackles upon a man's limbs, and then tell him that it is his right and duty to defend himself against an impending physical assult. If the right of defense exists, it includes and carries with it the right of such freedom of action as is essentual and necessary to make such defense complete."

Turning the same denial of excess to the court's, through the denial of the records, towards the contention of the Eight (8) Amendment, which stats . . ". . nor cruel and unusual punishment inflicted"

[18] The 8th Amendment, has been applied to several conditional, inflictions of punishment which was held by the federal courts to have violated the 8th Amendment. Accordingly, petitioners arguement is based on the theory *that any punishment by a state which is contrary to the law's of that*

state, and those of the United States, is beyond doubt cruel and unusual punishment, solely on the basis that the states have a right to make their laws, but there is no right to violate those laws by anyone, not even the state.

In *Roberson* vs. *California,* 370 U.S. 668, the Supreme Court clarefied any doubt in the 14th, Amendment's guarantee against cruel and unusual punishment, in ruling the California statue, and the treatment of drug addition, as cruel and unusual punishment this point was discussed in *Redding vs. Pate,* 220 F. 2d supp.124 (1963), wherein the court cited a bit of *Roberson* vs. *California,* stating:

> "The case makes it clear that the concept of cruel and unusual punishment is *broad and elastic.*" (emp. Add).

Petitioner further argues that the denial of records imposes a systematic process of distributing cruel and unusual punishment, equal to that which is established in the mode surrounding the forced confessions, inthat once the confession is taken, the defense against its use is impossible, because the prosecution does not have to introduce it to use it.

In the instent case the errors in the record will never be presented to a court of law, solely because they are not made available to the petitioner, thus who could contend that the conviction is valid or invalid.

It is irrevelant whether the state has a method to reproduce the records or not, the essence is that the state has established appellate review and cannot use any such reason to imped, block, hinder, or delay the process of appeals, and to do so is cruel and penertrating to the very concept of due process of law.

[19] As the California Supreme Court said in *People* vs. *Smith,* 34 Cal. 2d 449, 453 [211 P. 2d 561]. "Of course, in a criminal case, on a proper appeal, a defendent is not required to pay for a transcript."

Of course in the present case petitioner has never recieved a transcript, but a "proper appeal" was timely taken, under those circumstances to punish him by not issuing the records is unusual punishment and "undue hardship" which is the words employed by the Honorable Justice Traynor, of the State Supreme Court, in the case of *In Re: Henderson,* 61 Cal. 2d , (61 A.C.).

". . . . To deny him relief . . . when he requested the transcript would result in undue hardship."

And again the court said in *Phelan* vs. *Superior Court*, (1950) 35 Cal. 2d 363, 371-372, (217 P. 2d 951) "Equally the denial of transcripts imposes as a result and undue hardship."

In the case at bar it is argued, and on valid grounds that the repetitious denials of relief, by the way of denying the trial transcripts supasses the norm and is an extreme and crude form of cruel and unusual punishment.

In summerizing the explicit position of petitioners never ending plead for justice the guaranteed protection of the 14th, Amendment, inthat his cause qulifies him to befurnished afree trial transcripts and the california courts have continued to abridge that right, thus in doing so denied him privileges and immunites of the United States Constitution.

"That a discriminatory denial of the statutory right of a appea; so a violation of the Equal protection clause" *Cochran* vs. *Kansas*, 316 U.S. 255.

That by reason of his position and contentions of this petition, the writ of habeas corpus should and must issue as law and justice requires.

[20] Conclusion

Petitioner no longer pleads for the release of records as a petitioner at present has suffered the extreme of deprivation, and cannot secure his rights in this state, thus petitioner as a product of this states discriminatory practis seeks release from prison as complete re-linguishment of all custody over petitioner.

Prayer

Wherefore petitioner prays that this honorable court will issue an order to the above named respondent ordering him, commanding him to release petitioner, from all custody, or in turn issue an order to show cause why such relief should not be granted, as law and justice requires.

It is so prayed, as petitioner forever prays.

Dated this 23 day of Nov. 1966. Under the penalty of perjury the foregoing is true and correct, as executed November, 23, 1966.

Willie Wade, Jr., P.O. Box A-38671A, Tamal, California. In Pro. Per.

[21] EXHIBIT * A

Law Offices of
BURTON MARKS
8447 Wilshire Boulevard, Suite 217
Beverly Hills, California 90211
Telephone (213) 653-4141

Burton Marks
Harvey A. Schneider

of counsel
Jack K. Berman

San Francisco Offices
Penthouse-Whitcombe Hotel
1231 Market Street
San Francisco, California 94114

In reply refer to file No:

May 6, 1966

Mr. Willie Waide, Jr.
Box No. A-38671A
Tamal, California

Re: People v. Waide, Crime No. 7496

Dear Mr. Waide:

In answer to your letter of April 26, 1966, wherein you requested the transcripts in the above entitled case, I regret to inform you that I cannot be of assistance.

In reviewing your file I find that I never did have the copies of the Clerk's Transcript and 3 volumes of the Reporter's Transcript which belong to either you or Mr. Pollard. They were apparently delivered to Mr. Pollard when he filed his Notice of Appeal and although I requested him to forward them to me, he did not do so.

In preparing Appellant's Opening Brief in this case, I find that I borrowed the transcripts from the office of the Attorney General here in Los Angeles and returned them to that office on March 1, 1961.

I do not recall your aunt coming to the office for the records and I suggest that you attempt to contact Mr. Pollard.

Very truly yours, /s/ B Marks.

BM : lm

66

* * * * *

[22] EXHIBIT * B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION TWO

WILLIE WADE, JR., Petitioner,

VS

THE PEOPLE OF THE STATE OF CALIFORNIA, et al., Respondent

Crim. No. 7496

MOTION AND AFFIDAVIT FOR THE ISSUENCE OF RECORDS

To: the Honorable Presiding judge of the above entitled court.

Comes now, Willie Wade, Jr., hereafter refered to as petitioner motions this honorable court for all records in the above criminal procedings, (Crim. No. 7496) People v. Wade, to be preparied and issued

The Honorable courts jurisdiction to issue the records in this case is based in the facts that this court rendered it's decision in the above numbered case on Augest 17 1961, Affirming the Los Angeles Superior Court order denying motion for new trial, thus petitioners timely notice of appeal gives him the right to there reporters transcript, further as petitioner is without funds to pay for such transcripts, they must be issued at the expense of the state, even though the ten day period for appeal has elapsed.

I

A certified copy of the transcripts were issued to petitioners co-defendant, Joe Lewis Pollard, but there exist a conflict of interest between the defendants, limiting the communications, thus petitioner cannot properly present his cause to the courts. Further, petitioner has attempted to secure the records from the attorney of record Mr. Burton Marks. see (exhibit—A) was to the effect another denial of records.

As an authority in the matter of issueing records to those who have timely appealed fron the judgemnt of the Superior Courts, petitioner depends solely upon the State Supreme

Courts opinion in the 1964 case of In Re: Henderson, (Crim No. 7631. In Bank, July 9, 1964,) In that case the petitioner requested a free reporters transcript, to effectively present his cause. The case at bar consist of the request, for records. Further as the court said in the case of In Re: Henderson, "On an appeal from a felony conviction in a superior court a defendant, regardless of his ability to pay, has a right to a reporters transcript furnished at the expense of the state." See People V. Smith (1949) 34 Cal. 2d 449, 450 (211 P.2d 561).

[23] The case at bar the petitioner was found guilty of Murder in the First Degree, sentenced to his natural life in the state prison, as the law prescribes, and he has suffered this undue hardship, in his attempted to secure the records which he has a right to,

II

It is requested that this honorable Court issue an order to the Superior Court of the County of Los Angeles, California, ordering the said Court to prepair the following records, and forward a certified copy to petitioner, to consist of:

1. the records of arrest, or reports thereof.
2. records of the information.
3. records of the arraignment.
4. records of the preliminary hearing.
5. records of the trial.
6. records of the sentencing.

Conclusion

That for the facts established in this Motion for Records, It is respectfully requested that this Honorable Court, issue an order commanding the Superior Court of the County of Los Angeles, California, Clerk, to forward the said records to Willie Wade, Jr., A—38671A, San Quentin, Calif. Free of any charge, as petitioner is without funds with which to pay the cost.

Accordingly, it is so prayed.

I declare under the penality of perjury that the foregoing is true and correct.

Dated This 23 day of Nov. 1966.

Respectfully Requested, /s/ Willie Wade, Jr., Box A-38671A, Tamal, California.

* * * * *

[24] EXHIBIT * C

clerk's office
DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA
second appellate district
1201 State Building
217 West First Street
Phone: MA 0-3180

May 27, 1966

J.T. Alley
clerk

Willie Wade, Jr.
A-38671
Tamal, Calif.

clay robbins, jr.
chief deputy
R.N. Wilson
J.L. Kavanagh
H.W. Cunningham
deputies

2d Crim 7496

Los Angeles, California 90012

At the direction of the court returning herewith your motion for records for the reason that your case is long since final and this office is possessed with only the original record and have no method of duplication.

J.T. Alley, Clerk, By /s/J.L. Kavanagh, Deputy.

* * * * *

[25] EXHIBIT * D

In Pro. Per.
Willie Wade, Jr.
Box A-38671A
Tamal, California,

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. —

WILLIE WADE, JR., In Pro. Per. Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, et., al,. Respondents.

A PETITION FOR A WRIT OF HABEAS CORPUS

To: The Honorable Justice of the above entitled Court, and associates Justice's therein.

Comes now, Willie Wade, Jr., herein and after referred to as petitioner, in the above entitled matter, moves this Honorable Court to issue all records in the Case of *People vs. Wade, No. 7496,* from the illegal restrainment by the people of the state of california, that he, petitioner is a citizen of the united states, and is at present a resident of the county of Marin, state of california, over the age of twenty one (21) years

Jurisdiction

This Honorable Courts Jurisdiction is invoked under the authority and power of the Constitution of the State of California, Article VI, Section 5, and confered by the penal code, of the State of California, Sections: 1473; 1478; 1487.
Petitioner was informed by

Statement of the Case

Petitioner was charged in an information with a felony to wit a violation of Penal Code, section 187, better known as murder, by a jury trial that murder was found to be in the first degree, punishable bydeath as the law prescrives, however, the Honorable Judge, of the superior court of the

county of Los Angeles, California, found that punishment to be that of Natural Life, in prison. (penal code section, 1181.7), On a timely motion for a new trial, by counsel of record.

The petitioner Appealed to the District Court of Appeals Second Appellate District, Southern Division, of California, (case no. *7496*). Thus the Appellate Court, Affirmed the conviction and dismissed the Appeal, on August 17, 1961. [26] The petitioner requested for records from the Superior Court of Los Angeles. request was denied *October 1965*.

The petitioner request for records fron the Attorney of records Mr. Burton Marks, the said Attorney didnot have such records, on May 6, 1966.

The petitioner requested for records through a formal *Motion for Records* to the District Court of Appeals, however, the request was denied by the Clerk and the Motion for Records was not filed, on May 17, 1966.

Statement of the Facts

Petitioner was informed by the Superior Court of Los Angeles, California. Clerk, in reply to a request for records that either the Attorney of records or the Appellate Court had the records in the case of *People* vs. *Wade*, No 7496. Thereafter, petitioner wrote to Mr. Marks, who didnot reply, petitioner has contacted his relatives to secure the records from said counsel. thus after a year petitioners relatives informed him that they could not pay for said records due to finanitual problems, neverthe-less, petitioner requested the records again from Mr. Marks, who informed the petitioner that the records he used during the appeal belonged to the Attorney Generals Office or the District Attorney, and that he had returned them to that office, the Attorney said, that the co-defendent had the copy of the records, and had refused to forward them when requested, by Mr. Marks, to file the opening brief in the Appellate Court.

However the Co-defendant dismissed his appeal before the hearing and retained his copy of the records, and refused to allow petitioner to use them, thus adding to the conflict of interest, and limiting the communications.

Thereafter the petitioner Motioned the Appellate Court for records in a formal Motion for Records, the Clerk, denied the motion without filing, the said motion, petitioner is without funds with which to pay.

Allegations

Petitioner is at present being denied due process of law and equal protection of the law by the illegall restrainment of this trial records, by the People of the State of California

Arguement

Your petitioner move's this honorable court, as a last resort to issue all records in the above numbered cause to Willie Wade, Jr. at San Quentin, state prison, that the said petitioner has no funds with which to pay the cost of securing the following records:

1. Records of the information
2. Records of the arraingment
[27] 3. Records of the preliminary hearing
4. Records of the trial/reporters transcripts/
5. Records of the sentencing
6. Records of the arrest/arrest reports/

A certified copy of the aforesaid records, were issued to the petitioners co-defendant Joe Lewis Pollard, but there exist a conflict of interest and petitioner cannot properly present his cause before the courts.

That petitioner believes that he has a legal right to all records in the case at bar, thus it is so requested that this honorable court issue an order granting the petitioner all records.

Conclusion and Prayer

That for the afore stated facts established in this petitioners, petition for a writ of habeas corpus, it is so requested that this honorable court issue the records in the case at bar or issue an order to the District court of Appeal commanding them to issue the records to *Willie Wade, Jr.* box A-38671A Tamal, California. Free of any charge, as petitioner is without fimds with which to pay.

Accordingly it is so prayed as petitioner for ever prays.

I, Willie Wade, Jr., swear under the penality of perjury that the foregoing is true and correct.

Dated this — day of — 1966.

Respectfully Submitted, /s/ Willie Wade, Jr., A-38671A.

* * * * *

[28] EXHIBIT * E

Office Of The Clerk,

SUPREME COURT OF CALIFORNIA
William I. Sullivan, Clerk

San Francisco, California
September 22, 1966

G.E. Bishel, Chief Deputy
Deputies
Joseph M. Rogers
Keith M. Hawkes
Remo C. Matteoli
Mark F. Thompson
San Francisco
David Blomgren
Robert F. Johnson
Los Angeles
A.F. Bradovich
Sacramento

offices
San Francisco 94102
4250 State Building
Los Angeles 90012
1005 State Building
Sacramento 95814
108 Library and Court Build

Mr. Willie Wade, Jr.
Box A-38671-A
State Prison
San Quentin, California 94964

Re: 2 Crim. 7496—People v. Wade, et al.

Dear Sir:

In response to your request for records in the above case, you are advised that such a request should be directed to the court possessed of the original record. In this instance, it is the District Court of Appeal, Second Appellate District, State Building, Los Angeles.

Very truely yours, William I. Sullivan, Clerk, By:
/s/ G. E. Bishel, Chief Deputy.

* * * * *

[29] EXHIBIT * F

DISTRICT COURT OF APPEALS, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

Name Willie Wade Jr
Box No. A-38671A.
Date Sept /26/, 1966

Re: People v. Willie Wade Jr

2d Crim 7496

To Clerk.

Sir; I Willie Wade Jr. Defendant in the above numbered case.

Makes the following request, my finanucal position has changed and thus I would like to know the exact costs of the following records and who should I write to secure them.

The records consist of:
(1) The trial transcripts.
(2) The records of sentence.
In closing I thank you in advance.

/s/ Willie Wade Jr, A38671A, Tamal, Calif. 94964.

This court has no facility for reproducing records. The court records here could be made available for reproduction with whatever reproducing firm you might obtain to copy our records. Any costs for such service would be between you and the reproducing firm you hire. Or, it is possible that the Superior Court would still have these records and that they might perform the service for a fee. You could contact the Criminal Appellate Dept. there.

(rubber stamp)

DISTRICT COURT OF APPEAL
SECOND APPELLATE DISTRICT
SEP 29 1966

* * * * *

[30] EXHIBIT * G

County of Los Angeles

COUNTY CLERK AND CLERK OF THE SUPERIOR COURT
111 North Hill Street

Mailing Address: P.O. Box 151
Los Angeles, California 90053

Madison 5-3414

October 24, 1966

William G. Sharp
County Clerk

E.G. Hatcher
Chief Deputy

Willie Wade, Jr.
Box No. A 38671 A
Tamal, California

Re: Superior Court Case No. 229683

The People vs. Willie Wade Jr.

Dear Sir:

In response to your request, you are advised that the fee for certified copies of the following document amounts to $1.50.

Judgment of November 11, 1960, 1 page	$ .50
Certification	1.00

Under the laws of this State, all statutory fees must be paid in advance. In reply, please refer to the aforementioned case Number.

The transcript of the proceedings had in Superior Court can be obtained from the official court reporter who reported the proceedings. You must contact the reporter and make your own financial arrangements with him concerning the transcripts.

For your information, the names and addreses of the reporters are as follows:

Barbara Heslowitz, 208 Brunswig Building, 510 New High Street, Los Angeles, Calif. Laura Breska, 2871

Nichols Canyon Place, Los Angeles, California Jean Henderson, 407 R Courthouse, 111 North Hill, Los Angeles, California Pauline Ross, 3731 Weslin Avenue, Sherman Oaks, California Julius Koliner, 807 Hall of Justice, 211 West Temple, Los Angeles, California Ronald V. Olds 200 North Garfield, Pasadena, California Margaret Lund, 1725 Main Street, Santa Monica, California.

Very truley yours, William G. Sharp, County Clerk.

By /s/ P. J. Talmachoff, Chief, Criminal Division.

PJT/km

* * * * *

[30a] AFFIDAVIT OF VERIFICATION Omitted in printing.

[30b] PROOF OF SERVICE BY MAIL Omitted in printing.

[File endorsement omitted]

[31] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

No. 46568

[Title omitted]

ORDER TO SHOW CAUSE—February 15, 1967

Based upon the petition filed herein and good cause appearing:

It Is Hereby Ordered that Respondent(s) file a return with this Court on or before the [1] 24th day of February, 1967, to show cause, if any there be, why a writ of habeas corpus should not be issued herein;

It Is Further Hereby Ordered that the Clerk of this Court forthwith serve a copy of this order upon Respondent(s) as well as upon Petitioner and a copy of the petition and of this order upon official counsel for Respondent(s) and that Respondent(s) serve a copy of the return upon Petitioner prior to the filing thereof;

It Is Further Hereby Ordered that if Petitioner files a traverse to the return, Petitioner shall do so prior to the date next below specified; and

It Is Further Hereby Ordered that Respondent(s) or counsel for Respondent(s) appear in person before this Court on the [2] 6th day of March, 1967, at 9:45 a.m. to complete compliance with this order to show cause.

Dated: February 15, 1967.

Copies mailed to: AG.* & Pet. 2-16-67 T.P.U.

Alfonso J. Zirpoli, Judge

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* Pet. also.

[1] Specify a date approximately ten days after date of order.

[2] Specify a date not later than twenty days after date of order.

[32] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

No. 46568

[Title omitted]

RETURN TO ORDER TO SHOW CAUSE AND POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS —Filed February 24, 1967

Come now Lawrence E. Wilson, Warden of the California State Prison at San Quentin, and the People of the State of California, and for a return to the order to show cause heretofore issued in the above-entitled matter, returnable the 24th day of February, 1967, state:

I

That petitioner, Willie Wade, Jr., is properly imprisoned in the California State Prison at San Quentin, California, pursuant to two valid judgments and orders of commitment of the Superior Court of the State of California for the County of Los Angeles. In an action entitled "The People [33] of the State of California vs. Willie Wade, Jr.," No. 182319, in the files of said superior court, petitioner was convicted on October 11, 1956, of violation of California Penal Code section 245 (assault with a deadly weapon) and was sentenced to the state prison for the term prescribed by law (ten years maximum). Petitioner was represented by counsel. A certified copy of this order of commitment is attached hereto and made a part hereof and is "EXHIBIT A." In an action entitled "The People of the State of California vs. Willie Wade, Jr.," No. 229683, in the files of said superior court, petitioner was convicted by jury on November 1, 1960, of violation of California Penal Code section 187 (first degree murder) and was sentenced to the state prison for the term of his natural life. Petitioner was represented by counsel. A copy of this judgment and order of commitment is attached hereto and made a part hereof and is "EXHIBIT B."

II

That petitioner appealed his conviction of violation of Penal Code section 187, see Exhibit B, *supra*, to the Court of Appeal of the State of California, Second Appellate District, Case No. 7946. That on August 17, 1961, the Court of Appeal affirmed petitioner's conviction of violation of Penal Code section 187.

III

That petitioner had the benefit of assigned counsel in the preparation of the above appeal. That such assigned counsel had access to, and in fact used to prepare the briefs on appeal, a complete stenographer's record and clerk's transcript of the proceedings before the trial court in Los Angeles County Case No. 229683, which resulted in petitioner's conviction of violation of Penal Code section 187. See Peti-
[34] tioner's Exhibit A.

Wherefore, respondents respectfully pray that the order to show cause heretofore issued should be discharged, the petition denied and the proceedings dismissed.

Dated: February 24, 1967

Thomas C. Lynch, Attorney General of the State of California. Robert R. Granucci, Deputy Attorney General. /s/ Karl S. Mayer, Deputy Attorney General, Attorneys for Respondents.

[35] Points and Authorities in Support of Return to Order to Show Cause

Petitioner seeks a release from his custody on the ground that his continuing commitment is invalid for the sole reason that the State of California has failed to put at his disposal a free reporter's transcript of his proceedings at the trial which resulted in his conviction of first degree murder.

Petitioner has not alleged that the proceedings before the trial court which led to this conviction were in any way unfair, nor has he alleged that the proceedings on appeal which resulted in the affirmance of this conviction were in any way unfair.

Moreover, Exhibit A, attached to and incorporated in petitioner's petition affirmatively shows that petitioner was represented by counsel on appeal and that his appellate counsel had access to and in fact used a clerk's transcript and a complete reporter's transcript of the proceedings at trial.

Petitioner has not alleged that his representations by either trial or appellate counsel was in any way inadequate.

It it apparent that the petition at bar lacks any contention of law or allegation of fact cognizable by this Court in a habeas corpus proceeding which would justify the granting of the relief prayed for by petitioner or otherwise justify issuance of a writ of habeas corpus.

Conclusion

For the foregoing reasons, respondent respectfully [35a] submits that the order to show cause should be discharged, the petition denied and the proceedings dismissed.

Dated: February 24, 1967

Thomas C. Lynch, Attorney General of the State of California. Robert R. Granucci, Deputy Attorney General. /s/ Karl S. Mayer, Deputy Attorney General, Attorneys for Respondents.

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[36] Statement of Service by Mail Omitted in printing.

[37] EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

MINUTES

October 11, 1956

Present Hon Allen T Lynch, Judge
Department No. 46

182319

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

WILLIE WADE, JR., Alias William Wade, Jr., Defendant,

Deputy District Attorney J Kolts; Deputy Probation Officer H E Weissberg; and Defendant with his counsel, Deputy Public Defender J Brettmann, present. The true name of defendant is "Willie Wade, Jr.". Probation is denied and defendant is sentenced as indicated.

Whereas the said defendant having been duly found guilty in this court of the crime of ASSAULT WITH A DEADLY WEAPON, (Sec 245 PC), a felony, as charged in the information

[C. I. M. 1956 OCT 24 PM 1:55 G. C. Admittance.]

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term prescribed by law.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

This Minute Order has been entered on Oct 16, 1956, Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By C. T. Harold, Deputy.

MINUTES—State Prison (Men)

The within instrument is a correct copy of the original on file in this office.

Attest:

L. E. Wilson, Warden California State Prison at San Quentin By W. Schiller, Records Officer.

[38] EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

JUDGMENT

Department No. 105

November 1, 1960

Present Hon. Lewis Drucker, Judge

22968-3

THE PEOPLE OF THE STATE OF CALIFORNIA,

vs.

WILLIE WADE, JR.

Hearing re defendant's motion for a new trial, continued from October 20, 1960, is resumed. Deputy District Attorney Samuel Mayerson and Defendant with counsel, Joseph Rosen, present. Further argument is made by respective counsel. Defendant moves for reduction of the penalty fixed by the Jury. The penalty is ordered reduced to Life Imprisonment and as reduced, defendant's motion for a new trial is denied. Defendant waives time. Defendant is sentenced as indicated. Subsequently: Defendant's Notice of Appeal is filed. Pursuant to defendant's written motion for stay of execution of sentence, execution of sentence, herein, is ordered stayed to and including January 1, 1961.

Whereas the said defendant having been duly found guilty in this court of the crime of MURDER (Sec 187 PC), a felony, as charged in the information, which the Jury found to be Murder of the first degree and fixed the penalty at death and in lieu of granting a new trial the Court reduced the penalty to life imprisonment.

[C. I. M. 1961 Jan 10 PM 1:50, G. C. Admittance.]

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term of his natural life.

It is further Ordered that the defendant be remanded into

the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

This Minute Order has been entered on Nov. 4, 1960, Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By Virgil Henry, Deputy

JUDGMENT—State Prison (Men)

The within instrument is a correct copy of the original on file in this office.

Attest:

L. E. Wilson, Warden California State Prison at San Quentin By W. Schiller, Records Officer.

[39-45] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title omitted]

Case No. Civil No. 46568

MOTION TO STAY PROCEEDINGS—Filed March 8, 1967

This court isued an order to show cause in the above entitled case on February 16, 1967, to be returned on February 24, 1967, and allowing Petitioner until the 6th Of March 1967, in order to file a Traverse to the return to the order to show cause. Petitioner received the Respondent's return on March 1, 1967, and on March 2, 1967, while petitioner was setting in the sun on the lower yard with another inmate reading over the return Office Boysen, working in the capcity of Lower Yard Stg. taken the return and accused Petitioner of giving legal assistances, as a result of this act the Petitioner is unable to met the March 6, 1967 deadline and motion this court to stay this proceeding pending the determination of the civil complaint hereto attached.

Plaintiff feel that without this action being decided he would be unable to file an adequate Treverse tot the Respondent's return to the order to show cause.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated: March 6, 1967, at Tamal, California.

/S/ Charles R. Pahrman, my Commission expires Jan. 20, 1969.

Willie Wade, Jr, Petitioner, Box No. A-38671A, Tamal, California.

Subscribed and sworn to before me this 6th day of April, 1967, Charles R. Pahrman, Notary Public in and for the County of Marin, State of California.

* * * * *

[46] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 46568

[Title omitted]

TRAVERSE IN OPPOSITION TO THE RETURN TO THE ORDER TO SHOW CAUSE AND ARGUMENT POINTS AND AUTHORTIES

Come's now, Willie Wade, Jr., Petitioner, in the above entitled matter, and Petitioner in the matter of 'Petition for a Writ of Habeas Corpus, who states;

I

The petitioner Willie Wade, Jr., is imprisoned in the State of California, at San Quentin, pursuant to *one* W.W. judgment and commitment of the Superior Court of the State of California, for the County of Los Angeles, in the action entitled "The People of the State of California VS. Willie Wade, Jr.," No. 229683, convicted on November 1, 1960, by jury, of violation of the Cal. Pen. Code section 187, (murder in the first degree), and thereafter, was sentenced to the state prison for the term of his natural life.

The Respondents *incorrectly* relates that "Petitioner, Willie Wade, Jr., in properly imprisoned in California State Prison at San Quentin, California pursuant to two valid judgments. . . . ." (see paragarph 'I' Respondents Return).

Respondent refers to the commitment attached to the 'Return' and made apart thereof as "EXHIBIT A", (Case No. 182319).

[47] The said violation of Cal. Pen. Code sec., 245, (assault with a deadly weapon), a maximum term of ten (10) years, however, the conviction was had on October 11, 1956, thus the sentence expired October 11, 1966, which would be the maximun term of ten years, by law, and therefore Petitioner is not imprisoned under the said commitment.

II

Petitioner properly Appealed his conviction of violation of Penal Code sec., 187, to the District Court of Appeals of the State of California, second Appellate District, Case no.

7496. On August 17, 1961, the Court of Appeals erroniously affirmed the conviction, as Petitioner believes.

III

Petitioner was appointed counsel in the preparation of above said appeal in case no. 229683, however counsel withdrew through his own motion.

Dated, March 20, 1967.

Willie Wade, Jr., P.O. Box A-38671A, Tamal, California.

[48] Arguement Points of Authorities

Petitioner seeks a release from all custody on the grounds that the State of California has denied his due process and equal protection of the law, by the illegally restrainment of his records and denying him access to the courts and subsequently inflicting cruel and unusual punishment, through practicing invidious discreimination on a finanual basis, thusly depriving him of rights and privileges enjoyed by other person, inmates incarcerated in this state, thereby making his 'custody in violation of the Constitution or laws or treaties of the United States. Title 28, U.S.C.A. 2241 (3).

It is in fact and in law that petitioner is entitled to release from prison, "Moreover, so far as the supression of respondent's original appeal papers is concerned, the record before us strongly indicates that ascribes to the state supreme court could not have been made." *Cf. Dowd* v. *United States ex rel,* 340 U.S. 206.

And as the court said in closing the above entitled case: (Dowd, supra), "On remand, the District Court should enter such orders as are appropriate to allow the state a reasonable time in which to afford respondent the full appellate review he would have received but for the supression of his papers, filing which he shall be discharged. See Mahler v. Eby, 264 U.S. 32, 46." Cf. Dowd v. United States, 340 U.S. 206.

Therefore it is apparent that the supression of the records in the instant case requires relinquishment of all custody, in that such supression of records and the same establishes a method by which to limit petitioners access to the courts, and inflicts a sufferage upon him grater than any physical

abuse, that such unusual punishment is cruel, and psycologically defeating, to the human liberity, W.W. in the very construction of the Constitution, as made appliable to the States by virture of the Due Process and Equal Protection clauses of the 14th, Amendment to the U.S, Constitution. One further point from Dowd, supra, the Court said: "Moreover, the actual record (if appellate counsel could have it to inspect) might disclose issues substantial enough to constitute probable or possible 'plain error' even though trial counsel was not aware of their existence; and the indigent should have the same opportunity as the wealthy to urge that plain error should be noticed on appeal."

[49] The request for a discharge from all custody is in order, on the basis that the State of California, has been allowed the right to make it laws governing the issuance of records and appeals, thus to establish a system contary to to the one's which are established, and use that system on an discriminatory basis, which vi olates the U.S. Constitution, demands nothing less then release. "This Court has never held that the states are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be keept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin* v. *Illinois,* 351 U.S. 12,; *Douglas* v. *California,* 372 U.S. 353; *Lane* v. *Brown,* 372 U.S. 477; *Draper* v. *Washington,* 372 U.S. 487.

"That a discriminatory denial of the statutory right of appeal is a violation of the Equal Protection clause" *Cochran* v. *Kansas,* 316 U.S. 255.

The exhibits attached to the original petition for a writ of Habeas Corpus will clearly show that IF PETITIONER HAS THE MONEY HE CAN BUY JUSTICE IN THIS STATE, "There remains the question of the disposition to be made of the case. Fortunately, we are not confronted with the dilemma envisaged by the State of having to choose between ordering an absolute dischareg /sic/ of the prisoner and denying him all relief. The District Court has power in a habeas corpus proceeding to "dispose of the matter as law and justice require." 28 U.S.C. sec. 2243. The Fourtheenth Amendment precludes Indiana from keeping him of the type of appeal generally afforded those convicted of crime. On the other hand, justice does not require Indiana to discharge

a respondent if such an appeal is granted and revels a trial record free from error. Now that this court has determined the Federal Constitutional question, Indiana may find it possible to provide the appellate review which respondent is entitled. The judgments of the Court of Appeals and the District Court are vacated and the case remanded. On remand, the District Court should enter such orders as are appropriate to allow the state a reasonable time in which to afford respondent the full appellate review he would have received *but for the suppression of his /records/ papers, failing which he shall be discharged.* See *Mahler* v. *Fry,* 264 U.S. 32, 46." Cf. *Dowd* vs. *United States,* 340 U.S. 206 at p. 210.

As the only question is the discharge of petitioner, remains, it is held in: Cochran v. Kansas, supra, "if the officials of a state penitentiary in enforcing prison ruls has supressed appeal documents of an inmate, thereby making it impossiable for him to perfect an appeal within the time prescribed by statues, such inmate was deprived of his rights under the fourtheenth amendment, and he was entitled to releas upon petition for Writ of Habeas Corpus." 316 U.S. 255.

Conclusion

That for the afore said reasons and the factual position as supported by law and the Constitution of the United Stated, petitioner respectfully moves this Honorable Court, to issue an order to the Said Respondent, ordering him, command him to release petitioner Willie Wade, Jr., from all custody, as law and justice requires, Accordingly, it is so prayed, as petitioner forever parys.

Dated This 20 Day of March, 1967.

Under the penalty of purjury the foregoing is true and correct.

Willie Wade, Jr., Petitioner, Box A-38671 A, Tamal, California.

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[50] Verification Omitted in printing.

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[51] Proof of Service by Mail Omitted in printing.

[52] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title omitted]

No. 46568

ORDER GRANTING PETITION FOR A WRIT OF HABEAS CORPUS—Filed June 5, 1967.

Petitioner is a California State prisoner confined at the San Quentin State Prison pursuant to a 1960 conviction of first degree murder, Cal. Pen. Code § 187, for which he received a sentence of imprisonment for life.

He makes application to this court for a writ of habeas corpus, alleging that he is indigent and wishes to prepare a petition for a writ of habeas corpus attacking his conviction, but that the State of California refuses to provide him with a free copy of the transcript of his trial to aid him in preparation of such a petition.[1]

[53] The question of entitlement to a transcript to prepare a petition for a writ of habeas corpus is one of first

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[1] Petitioner took an appeals from his conviction to the California District Court of Appeal, which affirmed the conviction, although no reported opinion has been found or cited. It appears that petitioner's attorney used the original transcript borrowed temporarily from the court to prepare his brief, but that petitioner did not receive a copy of the transcript. Petitioner's co-defendant, one Joe Lewis Pollard, allegedly received a copy of the transcript and still has it in his possession. Petitioner apparently does not have access to Pollard's copy of the transcript, and he further alleges that there is presently a conflict of interest between them.

Petitioner exhausted his state remedies by filing a motion for the issuance of records with the District Court of Appeal, which was denied in May of 1966, and subsequently by filing a petition for a writ of habeas corpus in the California Supreme Court, which was denied in August of 1966, when he again attempted to secure the desired transcript.

impression in this court, and the court concludes that he is so entitled.

The United States Supreme Court, as early as 1961, stated in dicta that no financial consideration could be interposed to deny a petitioner the right to sue for his liberty. *Smith* v. *Bennett*, 365 U.S. 708 (1961). *Smith* dealt with a habeas corpus filing fee, but relied upon the reasoning of *Griffin* v. *Illinois*, 351 U.S. 12 (1956), which is a transcript on appeal case. In *Lane* v. *Brown*, 372 U.S. 477 (1963), the Supreme Court, relying upon dicta in *Smith*, held that a state must provide a transcript for the appeal of post conviction proceedings. This principle was reaffirmed in *Long* v. *District Court*, 385 U.S. 192 (1966). In *Long*, the court further restated the underlying consideration that "these principles were not to be limited to direct appeals from criminal convictions, but extended alike to state post-conviction proceedings . . .", *Long* v. *District Court*, *supra* at 194.

Thus, although there is no square holding on the precise question of the right to a transcript in preparing a petition for a writ of habeas corpus rather than an appeal, the logic of the Supreme Court holdings compels a finding that such a right exists.

[54] Respondent and the State of California have taken the position that petitioner has shown no good cause for his request. There are two answers to this. First, he alleges that there were errors in his conviction, and second, it may not be possible to pinpoint such alleged errors in the absence of a transcript.

Accordingly, It Is Ordered that petitioner be released from the custody of respondent; however, execution of this order is suspended for a period of ten days from the entry thereof, within which time respondent may file a notice of appeal and request further stay. The order of release is without prejudice to the State to apply to have the order set aside in the event the aforementioned transcripts are provided to petitioner or the court is assured that they will be provided to petitioner within a reasonable time.

Dated: June 5, 1967

Alfonso J. Zirpoli, United States District Judge.

[55] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

No. 46568

[Title omitted]

NOTICE OF APPEAL—Filed June 15, 1967

Notice Is Hereby Given that Louis Nelson, Warden of the California State Prison at San Quentin, California, successor to Lawrence E. Wilson, named as respondent herein, and the People of the State of California, respondents, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the order and final judgment granting petition for writ of habeas corpus entered in this action on June 5, 1967.

Dated: June 14, 1967

Thomas C. Lynch, Attorney General of the State of California. Robert R. Granucci, Deputy Attorney General. Karl S. Mayer, Deputy Attorney General, Attorneys for Respondent.

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[56] STATEMENT OF SERVICE BY MAIL Omitted in printing.

[57] [File endorsement omitted]

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

No. 46568

[Title omitted]

ORDER STAYING EXECUTION OF JUDGMENT PENDING APPEAL—June 15, 1967

It Is Hereby Ordered that the Order of this Court entered June 5, 1967, in the above-entitled matter be stayed pending the timely filing of a notice of appeal by respondent and pending the determination of such appeal.

Dated: June 15, 1967

Alfonso J. Zirpoli, United States District Judge.

[58] In the United States District Court, Northern District of California

No. 46568

[Title omitted]

Petition for Certificate of Probable Cause—Filed June 15, 1967

Respondent, acting by the Attorney General of the State of California, hereby petitions for a certificate of probable cause in order that he may appeal to the United States Court of Appeals for the Ninth Circuit from the final order of this Court granting a petition for writ of habeas corpus entered in this action on June 5, 1967.

The People of the State of California respectfully urge that the certificate of probable cause be granted so that the Court of Appeals for the Ninth Circuit may review the decision of this Court holding that petitioner was denied a federal constitutional right by the failure of the State of California to provide him a free transcript of trial which he may desire to use for the preparation of a petition for writ of habeas corpus. The question is admittedly one of [59] first impression in this Court.

The People of the State of California present this petition to this Honorable Court as required by Title 28, United States Code section 2253.

Dated: June 14, 1967

Thomas C. Lynch, Attorney General of the State of California. Robert R. Granucci, Deputy Attorney General. Karl S. Mayer, Deputy Attorney General, Attorneys for Respondent.

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[60] Affidavit Omitted in printing.

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[61] Statement of Service by Mail Omitted in printing.

[62-65] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

No. 46568

[Title omitted]

CERTIFICATE OF PROBABLE CAUSE—June 15, 1967

Pursuant to Title 28, United States Code section 2253, the Court hereby certifies that there is probable cause for an appeal in the above-entitled case.

Dated: June 15, 1967.

Alfonso J. Zirpoli, United States District Judge.

[66] IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,040

LAWRENCE E. WILSON, Warden, Appellant,

vs.

WILLIE WADE, JR., Appellee.

OPINION—March 11, 1968

Appeal from the United States District Court for the Northern District of California

Before POPE, DUNIWAY and CARTER, Circuit Judges.

POPE, Circuit Judge.

The appellee Wade is a California state prisoner who in November, 1960, was found guilty of murder in the first degree and was sentenced to life imprisonment. He appealed his sentence to the District Court of Appeal where his conviction was affirmed on April 17, 1961. In May, 1966, he made an application to the same District Court of Appeal which he describes as one "for the issuance of records". On July 21, 1966, he filed in the State Supreme Court a petition for writ of habeas corpus. His application in the District Court of Appeal, he says, was denied without filing and his petition for habeas corpus in the State Supreme Court was denied without opinion. Thereafter and on February 16, 1967, he filed in the court below a petition for writ of habeas corpus. In that petition he stated that the ground for it was "that I am being denied due process and equal protection of the law by the State of California by the illegal retrainment [sic] of my trial records." It was shown that at all times here mentioned he was indigent and without funds or means of paying for the copying of the transcript of the proceedings at his trial and he was permitted to file his action in forma pauperis.

[67] It appears that when Wade took his original appeal from his conviction he was represented by appointed counsel. At that time one Pollard was a co-defendant and a copy of the transcript was allegedly furnished to Pollard. California Rules of Court, (35(c), 10(c)), provide that every person convicted of crime is entitled to a free transcript of

the proceedings for purposes of appeal. It is provided that where two or more defendants are convicted in the same case and the judgment of death is not rendered, one free copy is made available to the defendants to share.

The court below granted Wade's petition for a writ of habeas corpus and in doing so recited the circumstances relating to the availability of a transcript at the time of the appeal and since then, as follows: "It appears that petitioner's attorney used the original transcript borrowed temporarily from the court to prepare his brief, but that petitioner did not receive a copy of the transcript. Petitioner's co-defendant, one Joe Lewis Pollard, allegedly received a copy of the transcript and still has it in his possession. Petitioner apparently does not have access to Pollard's copy of the transcript, and he further alleges that there is presently a conflict of interest between them."

There is no doubt but that an indigent state prisoner is entitled to a free transcript for use in an appeal from his state conviction where that is needed and that he has a like right to a free transcript in order to prosecute a claim for post conviction relief where that is essential in order to permit him to demonstrate his right to such relief. See the cases cited in Roberts v. La Vallee, 389 U.S. 40, 42.2 But the question here is whether Wade has presented any grounds for post conviction relief, the prosecution of which might require him to have the use of a trial transcript.

This court dealt with this situation in McGarry v. Fogliani, 370 F. 2d 42, 44, where we said respecting that appellant: "He makes no showing whatever that any prejudicial errors occurred that would have called for a reversal of his conviction. There is nothing in the claim that the sentencing judge refused to allow an appeal from the conviction before appellant was sentenced. The right to appeal attached when appellant was sentenced. Nor is the court required to order a copy of appellant's trial transcript merely to enable appellant to 'comb the record in the hope of discovering some flaw.' "

[68] In the case before us the trial court failed to find that Wade was claiming that there was any error which occurred in the proceedings which led to his conviction which would warrant the granting of post-conviction relief.

So far as the district court's findings are concerned, our

holding in McGarry v. Fogliani, supra, would require us to say that Wade was not entitled to demand a transcript merely to enable him to comb the record in the hope of discovering some flaw.[1] The judgment must be reversed.[2]

It is so ordered.

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[1]Such authority as is available is in accord with what was stated in McGarry, see footnote 7, where the court cites United States v. Glass, 4th cir., 317 F. 2d 200, 202. Although the language there is in accord with the McGarry decision, under the circumstances of that case it may be dictum. Two other cases suggest the same rule: Ketcherside v. U. S., 6 cir., 317 F. 2d 807, 808, and Taylor v. United States, 9 cir., 238 F. 2d 409, 411, although both these two cases were primarily concerned with a construction of a federal statute relating to providing a transcript at government expense.

[2]Wade not only completed a commonly used prepared form of petition for habeas corpus, but he added to it a typewritten petition for the writ stating in general the same matters we have previously mentioned with an additional recital. After describing his sentence and life imprisonment, he continued: "Thereafter petitioner appealed to the district court of appeal of the State of California, Second Appellate District, in case No. 7496. The Appellate Court affirmed the conviction of the Superior Court of Los Angeles County, on August 17, 1961, and relieved the court appointed counsel on his own request." The last quoted paragraph would suggest to us that the circumstances under which his court appointed counsel was relieved of representation of Wade may well have been contrary to the rules laid down in Anders v. California, 386 U.S. 738.

The quoted allegation is wholly insufficient to demonstrate that Wade had been deprived of the rights which were recognized in the Anders case; but the petition would be susceptible to amendment were he given an opportunity to amend. However, a careful examination of the record discloses that he has never made any such point in his petitions in the state courts. In short, he had not exhausted his remedies available in the state courts as required by Title 28 §2254. We assume that if it is possible to make a case under the rule of Anders v. California, supra, nothing would prevent him from making such a claim hereafter for this judgment is not res judicata. Fay v. Noia, 372 U.S. 391, 423.

[69] IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22040

LAWRENCE E. WILSON, Warden, Appellant.

vs.

WILLIE WADE, JR., Appellee.

JUDGMENT—Filed and entered March 11, 1968.

Appeal from the United States District Court for the Northern District of California.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

[70] IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: POPE, DUNIWAY and CARTER, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING—May 3, 1968.

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellant filed April 8, 1968 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[71-72] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1968

No. 409 Misc.

WILLIE WADE, JR., Petitioner,

v.

LAWRENCE E. WILSON, WARDEN, et al.

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—February 24, 1969

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1084 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969—351 295/703

FILED JUN 27 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~1004~~ 55

PETITION NOT PRINTED
RESPONSE NOT PRINTED
BRIEF NOT PRINTED

WILLIE WADE, JR., *Petitioner,*

v.

LAWRENCE E. WILSON, WARDEN, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1084

WILLIE WADE, JR.,

Petitioner,

v.

LAWRENCE E. WILSON, WARDEN, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the United States District Court for the Northern District of California is reprinted at page 44 of the Appendix filed herewith. The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 390 F.2d 632, and is reprinted at page 50 of the Appendix filed herewith.

Statement of Jurisdiction

The decision of the United States Court of Appeals for the Ninth Circuit was rendered on March 11, 1968, and rehearing was denied on May 3, 1968. A petition for writ of certiorari was filed by the petitioner in this Court on June 17, 1968, and the petition was granted on February 24, 1969. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1). See also, *Ex parte Tom Tong*, 108 U.S. 556.

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> "Section 1. • • •. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rules 10 and 35 of the California Rules of Court are set forth in Appendix A hereto.

Questions Presented

1. Whether the practice of the State of California in furnishing a free transcript for purpose of appeal to every defendant tried separately in a felony case (whether or not indigent, and irrespective of the penalty imposed) while denying a free transcript to an indigent tried as co-defen-

dant in a felony case unless one of the co-defendants is under sentence of death violates the Fourteenth Amendment to the Constitution of the United States?

2. Whether an indigent defendant who has been denied a free transcript for direct appeal of his conviction under the circumstances here presented must set forth in his federal habeas corpus petition grounds for invalidating his conviction before the Federal court can order that a transcript be furnished?

Statement of the Case

Nine years ago petitioner Wade and his co-defendant, Pollard, were convicted of first degree murder in the Superior Court in Los Angeles, California. In lieu of granting petitioner's motion for a new trial, the trial judge reduced the death penalty imposed upon petitioner to life imprisonment (A. 37). Petitioner and Pollard each filed a notice of appeal to the California District Court of Appeal for the Second Appellate District (A. 11, 18).

Had they been tried separately, under California law each would have been automatically furnished with a free transcript upon the filing of his notice of appeal. However, because they were co-defendants, separate transcripts were denied to petitioner and Pollard in accordance with Rules 10 and 35 of the California Rules of Court which provide that where two or more co-defendants appeal their felony convictions and none was sentenced to death only one copy of the transcript shall be made available for all appealing defendants "in such manner as the judge, or the

clerk under his direction, shall prescribe." (See Rules 10(c) and 35(c) in Appendix A to this Brief.)

The transcript was sent by the clerk of the trial court to Pollard, who had a claimed conflict of interest with petitioner, and refused thereafter to make the transcript available to petitioner although requested to do so (A. 18, 19). Pollard subsequently dismissed his appeal, but never made available to petitioner the transcript given to him by the court (A. 24). As a result, petitioner had no opportunity to review the transcript prior to the trial court's certification of its correctness to the appellate court, and, as noted below, had no opportunity thereafter to utilize the transcript himself during the appellate process when he was without counsel.

Petitioner's court-appointed trial counsel withdrew after the trial, and when the appellate court appointed new counsel to represent petitioner for his appeal, petitioner had no transcript to make available to his counsel. Instead, his appellate counsel, who was unfamiliar with the trial proceedings, was forced to prepare his brief on appeal by borrowing the transcript from his opponent, the California Attorney General (A. 18). Subsequently petitioner's appellate counsel was, upon his own request, relieved as counsel prior to determination of petitioner's appeal (A. 11, 41). Thereafter the District Court of Appeal on August 17, 1961, affirmed petitioner's conviction in an unpublished opinion. Petitioner—who was then without counsel—had no access to the transcript, for the purpose of filing a petition for rehearing with the appellate court or a petition for hearing in the California Supreme Court, and no further steps were taken by him at that time to review his conviction.

Commencing in 1965, petitioner filed a series of petitions, as an indigent, with the trial court, the District Court of Appeal, which affirmed his conviction, and the California Supreme Court unsuccessfully seeking a copy of his transcript. The District Court of Appeal denied his request "for the reason that your case is long since final and this office is possessed with only the original record and have no method of duplication" (A. 22). The California Supreme Court thereafter denied a similar request set forth in a petition for habeas corpus on the sole ground that it should have been directed to the District Court of Appeal possessed of the original record, which court had already advised petitioner that it had no method of duplicating the transcript (A. 27). The District Court of Appeal subsequently advised petitioner that his transcript could indeed be duplicated pursuant to whatever arrangements as to reproduction petitioner might choose (A. 28). The trial court similarly advised petitioner that he could obtain a copy of his transcript by making his own financial arrangements directly with the court reporters who had reported his trial (A. 29).

Petitioner thereupon filed an in forma pauperis petition for a writ of habeas corpus with the United States District Court for the Northern District of California, alleging that he was being denied due process and equal protection of the law because the State of California had failed to furnish him, as an indigent, a free copy of his trial transcript in connection with his appeal (A. 3, 19). On February 15, 1967, the United States District Court issued an order to show cause why the writ of habeas corpus should not issue (A. 31) and, following a hearing, on June 5, 1967, issued an order granting the petition, noting that petitioner had

exhausted his stated remedies, and ordering that petitioner be released from custody unless the State provided him a transcript (A. 44).

The State appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the District Court on the ground that petitioner was not entitled to a transcript unless he first demonstrated errors in his trial which would warrant the granting of post-conviction relief.

Summary of Argument

A. Rules 10 and 35 of the California Rules of Court both by their terms and as applied in this case have deprived petitioner of due process and the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

1. By furnishing a free transcript for the purpose of appeal to every person who is tried separately in a felony case irrespective of the penalty imposed, but denying a free transcript to a person such as petitioner who is tried with one or more co-defendants in a felony case, unless one of the defendants is under sentence of death, the State of California has denied petitioner equal protection of the laws.

2. By furnishing a free transcript for the purpose of appeal to persons who are tried separately in felony cases and to persons who are co-defendants where one or more co-defendants are under sentence of death, but requiring co-defendants in other cases to pay for their transcripts, the State of California has interposed an unconstitutional barrier to the use of its criminal appellate procedures by indigents such as petitioner.

3. Even if Rules 10 and 35 of the California Rules of Court do not by their terms violate the Fourteenth Amendment to the United States Constitution, they have been applied in this case so as to deprive the petitioner of the equal protection of the laws.

B. Having been deprived of his trial transcript for use in connection with direct appeal of his conviction, petitioner is not required to set forth the specific grounds for attacking his original conviction as a condition precedent to obtaining the transcript in a Federal habeas corpus proceeding.

1. The decisions of this Court recognize that a defendant need not set forth specific grounds for reversal of his conviction as a condition precedent to obtaining a copy of a transcript.

2. To condition petitioner's right to a transcript on a showing of grounds for reversal of his conviction would deprive petitioner of due process and the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

A.

Rules 10 and 35 of the California Rules of Court, Both by Their Terms and as Applied in This Case, Have Deprived Petitioner of Due Process and the Equal Protection of the Laws in Violation of the Fourteenth Amendment to the United States Constitution.

1. Rules 10 and 35 Create an Irrational Discrimination Based Solely on Whether a Defendant Is Tried Separately or With a Co-Defendant.

Rules 10 and 35 of the California Rules of Court, by their terms, require the State of California to furnish a free transcript in connection with an appeal to every defendant, whether indigent or not, who is tried separately in a criminal proceeding in a Superior Court. Superior Courts have jurisdiction over all felony cases. California Constitution, Article VI, § 10. Thus, by way of example, a defendant who has been convicted of the felony of fraudulently selling securities (Cal. Corps. Code § 25541), and has been fined $5,000 but not sentenced to confinement is entitled to a free transcript at the State's expense in connection with his appeal even though he is a millionaire and clearly able to pay for his transcript. On the other hand, Rules 10 and 35 by their terms deny a defendant who has been tried with a co-defendant, convicted of murder, and sentenced to life imprisonment, the right to a free transcript even if he is an indigent unless his co-defendant has been sentenced to death.[1] The entitlement to a free transcript for purposes

[1] The most that such a defendant can hope for is that the trial judge or his clerk will make the record available to him on some limited basis.

of appeal in California may therefore turn on the wholly fortuitous circumstance as to whether a defendant is tried separately or with a co-defendant, irrespective of the type of crime involved, or the severity of the sentence imposed, and irrespective of the defendant's financial ability or inability to pay for the transcript.

Such a basis of classification bears no rational relationship to the constitutionally recognized objective of insuring that persons convicted of crimes have the transcripts of their trial proceedings available to them for the preparation of their appeals, particularly where, as here, a transcript is available (see, *Long* v. *District Court of Iowa,* 385 U.S. 192; *compare Gardner* v. *California,* 393 U.S. 367). Furthermore, here it may be within the power of the State prosecutor to choose whether a defendant will be entitled to a transcript if he is convicted, since the prosecutor initially may determine to try defendants separately rather than as co-defendants.

Although a state has no constitutional obligation to afford an appellate procedure in criminal cases (see, *McKane* v. *Durston,* 153 U.S. 684, 687-8), once it makes such a procedure available it must insure that the procedure operates in a fair and rational manner and does not unfairly discriminate against any particular class of defendants to whom the procedure is made available. (See, *Griffin* v. *Illinois,* 351 U.S. 12; *Douglas* v. *California,* 372 U.S. 353; *Williams* v. *City of Oklahoma City,* 37 Law Week 4524.) Therefore, even putting aside for the moment the question as to whether Rules 10 and 35 unconstitutionally discriminate against indigents, such Rules clearly discriminate

against persons who have the misfortune to be tried with co-defendants rather than separately, and for that reason alone Rules 10 and 35 create that sort of irrational discrimination which this Court has consistently viewed as violating the Fourteenth Amendment (see, *Rinaldi* v. *Yeager*, 384 U.S. 305, 308-9).

This discrimination becomes even more unsupportable in view of the California practice of extending the right to a free transcript to indigent defendants in *misdemeanor* cases where a transcript has been prepared and is necessary for an adequate and effective appellate review (see, *In re Henderson*, 61 Cal. 2d 541, 39 Cal. Rptr. 373).

2. Rules 10 and 35 Unfairly Discriminate Against Indigent Defendants.

The unfair operation of Rules 10 and 35 becomes even more apparent when applied to indigent defendants such as the petitioner in the instant case. If petitioner had been tried separately from his co-defendant Pollard (with whom he alleged he had a conflict of interest), he would have been entitled to a free transcript on appeal as a matter of right irrespective of the severity of the penalty imposed upon him. However, because he was tried with a co-defendant, he was thereby denied the right to his own free transcript even though he was tried and convicted of a serious felony and sentenced to life imprisonment. Furthermore, a copy of the transcript was furnished to his co-defendant, who refused to share it although he had dismissed his own appeal. After his court-appointed appellate attorney withdrew from the case, petitioner had no chance—even if he had the ability to do so—to review the record and represent himself in his appeal from his conviction.

In recent years this Court has clearly recognized that "differences in access to the instruments needed to vindicate legal rights when based upon the financial situation of the defendant are repugnant to the Constitution" (see, *Roberts* v. *LaVallee,* 389 U.S. 40), and that the transcript of a defendant's criminal proceedings is one of those instruments to which such unfettered access must be accorded to indigent defendants. (See, *Williams* v. *City of Oklahoma City,* 37 Law Week 4524; *Gardner* v. *California,* 393 U.S. 367; *Roberts* v. *LaVallee, supra; Long* v. *District Court of Iowa,* 385 U.S. 192; *Draper* v. *Washington,* 372 U.S. 487; *Lane* v. *Brown,* 372 U.S. 477; *Smith* v. *Bennett,* 365 U.S. 708; *Eskridge* v. *Washington State Board of Prison Terms and Paroles,* 357 U.S. 214; and *Griffin* v. *Illinois,* 351 U.S. 12.)

In *Griffin* v. *Illinois,* 351 U.S. 12, this Court first considered the extent to which an indigent defendant should be constitutionally afforded the right to a transcript in connection with his appeal of a conviction in a state court. The State of Illinois provided appeals as of right to all criminal defendants, but only indigent defendants sentenced to death were given a free transcript; all other defendants either purchased a transcript for appeal or went without. This Court held that denying indigents equal access to the appellate process violates their rights under the Fourteenth Amendment.

The importance of the case rests not only on the holding. In *Griffin,* this Court established the yardstick by which to measure all future distinctions between monied and indigent defendants on appeal. Thus, Mr. Justice Black highlighted the appropriate standards in his opinion:

"... our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' Chambers v. Florida, 309 U.S. 227, 241. See also Yick Wo v. Hopkins, 118 U.S. 356, 369." (351 U.S. at 17.)

"There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, *e.g.*, *McKane* v. *Durston*, 153 U.S. 684, 687-688. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." (351 U.S. at 18.)

Mr. Justice Black then described a state's denial of a trial transcript to indigents as "a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law .... Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." (351 U.S. at 19.)

Mr. Justice Frankfurter emphatically endorsed these statements:

> "But neither the fact that a State may deny the right of appeal altogether nor the right of a State to make an appropriate classification, based on differences in crimes and their punishment, nor the right of a State to lay down conditions its deems appropriate for criminal appeals, sanctions differentiations by a State that have no relation to a rational policy of criminal appeal or authorizes the imposition of conditions that offend the deepest presuppositions of our society." (351 U.S. at 21-22.)
>
> "• • • If it [a state] has a general policy of allowing criminal appeals, it cannot make a lack of means an effective bar to the exercise of this opportunity." (351 U.S. at 24.)

Petitioner's case here is remarkable not because it is unusual, but because today, more than thirteen years after enunciating the controlling principles and applying them to the facts in *Griffin,* this Court is asked to review an almost carbon copy of that seminal case. Indeed, the only difference between *Griffin* and the instant case is that in *Griffin* two indigent co-defendants appealing jointly were denied a transcript, whereas in this case one indigent co-defendant appealing separately has been denied a transcript. Illinois' denial of a free trial transcript was a blanket rule for all indigent appellants, whereas California's Rule 35(c) denies a free transcript only to those indigent appellants who are jointly tried and who are unfortunate enough not to be the one chosen by the clerk of the Court to receive the one transcript provided to co-defendants. There is no more

rational basis for the narrow discrimination practiced by California than there was for the broad discrimination practiced by Illinois thirteen years ago. Nor, it should be added, are constitutional rights protected only from broadly applicable denials. Indeed, California's discrimination is more invidious than Illinois' because it is capricious and provides for discrimination between indigents as well as between rich and poor.

In the years since *Griffin*, this Court has consistently recognized the importance of a transcript for the effective presentation of an indigent defendant's case for review by an appellate court. See *Eskridge* v. *Washington State Board of Prison Terms and Paroles, supra; Draper* v. *Washington, supra; Smith* v. *Bennett, supra; Lane* v. *Brown, supra; Long* v. *District Court of Iowa, supra; Roberts* v. *LaVallee, supra; Gardner* v. *California, supra; Williams* v. *City of Oklahoma City, supra.*

As recently as this Term, this Court had two occasions to again reconsider the importance of a transcript to an indigent defendant. In *Gardner* v. *California, supra,* this Court stated (393 U.S. at 370):

> "(P)etitioner carries the burden of convincing the appellate court that the hearing before the lower court was either inadequate or that the legal conclusions from the facts deduced were erroneous. A transcript is therefore the obvious starting point for those who try to make out a case for a second hearing. The State can hardly contend that a transcript is irrelevant to the second hearing, where it specifically provides one, upon request, to the appellate court and the State attorney. So long as this system of repeated hearings

exists and so long as transcripts are available for preparation of appellate hearings in habeas corpus cases, they may not be furnished those who can afford them and denied those who are paupers."

In *Williams* v. *City of Oklahoma City, supra,* this Court required the furnishing of a transcript necessary for an indigent defendant to be able to perfect an appeal from a misdemeanor conviction, noting that once avenues of appellate review are established these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

None of the decisions of this Court anywhere suggests that an indigent defendant should have any less entitlement to a transcript of his trial if he is tried as a co-defendant than as a single defendant. On the contrary, the decisions of this Court clearly require the conclusion that no such distinction be drawn. The overwhelming majority of the States of the United States have already come to the same conclusion. As indicated in the schedule appearing as Appendix B to this Brief, 39 of the 50 states recognize by statute or court rule or administrative practice that an indigent defendant in a felony case is entitled to a free transcript for purposes of appeal without drawing any distinction as to whether he is tried as a single defendant or with other defendants.[2] Only California, Georgia, Kentucky and New Mexico have statutes or court rules which expressly deny jointly tried co-defendants individual copies of their trial transcript for purpose of appeal. In addi-

[2] In thirteen of these states, some inquiry beyond the fact of indigency is provided for, thereby suggesting a possible conflict with this Court's decision in *Draper* v. *Washington,* 372 U.S. 487.

tion, the Attorneys General of three other states have advised counsel for petitioner that, as a matter of administrative practice, they presently construe their statutes or court rules (which in terms require furnishing of free transcripts to indigent defendants) not to afford each co-defendant a copy of the trial transcript, and, the Attorneys General of four other states have advised counsel for petitioner that the matter has not yet been resolved in those states. California is therefore in the distinct minority of states which do not afford an indigent co-defendant in a felony case a copy of the transcript of his trial for his own unrestricted use in preparing his appeal.

The cost of providing equal justice to all should not be a legitimate concern in determining whether it is to be provided. Even if it were, the requirement that each indigent co-defendant in a felony case be furnished a copy of the transcript of criminal proceedings should not impose an undue economic burden on the State of California. As indicated in the study made by the Bureau of Criminal Statistics of the California Department of Justice attached to this brief as Appendix C, based on a sampling of 11,005 criminal cases filed in Superior Courts in the State of California in 1968 (representing 20-25% of the total criminal cases filed in that year), 1,425 cases, or only 12.9% of the total, included two defendants, 296 cases, or 2.5%, included three defendants, and 141 cases, or 1.2%, included four or more defendants.[3]

[3] Although statistics are not available as to the number of these multiple defendant cases which involved indigents, the Bureau of Criminal Statistics has advised that of 17,268 defendants convicted in the Superior Court in Los Angeles County in 1967, 9,506 were defended by the Public Defender, 7,104 by private attorneys, 490 by court-appointed private attorneys, and 168 were not represented by an attorney.

Since under Rules 10 and 35 a minimum of three copies of the transcript are required to be prepared in any event, little added burden should be imposed by the requirement that each indigent co-defendant be furnished a copy of the transcript. In the overwhelming percentage of co-defendant cases, only one co-defendant is involved, and one additional copy of the transcript could easily be prepared at the time of preparation of the first three copies. In the relatively small percentage of cases where a number of additional copies would be required, or in lengthy trials where the preparation of one additional transcript by the reporter might be more costly, consideration can be given to adopting modern methods of duplicating documents. Even on a commercial basis, a copy of petitioner's trial and clerk's transcripts in this case (which are approximately 800 pages long) could be reproduced by a private reproduction service for approximately $80. If the State's own reproduction facilities are utilized, this cost could be substantially reduced to no more than $40, and perhaps even less, depending upon the type of reproduction facilities utilized. Even this modest cost might be recouped by the State of California if it chose to require persons who are financially able to do so to pay for their transcripts, and to require indigents who are furnished free transcripts to reimburse the State for their cost on a non-discriminatory basis. See, *Rinaldi* v. *Yeager,* 384 U.S. 305.

The hidden cost of *failure* to provide transcripts to indigents has been clearly pointed out by the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice in considering the federal practice with respect to making transcripts available as follows:

The Committee believes that proper evaluation of comparative costs requires that attention be directed to the "hidden costs" of the present system. First there are the costs in judicial time in the district courts and courts of appeals, just noted, that result from the administration of the present system. Second are the costs in the time of public officials required to be interviewed by assigned counsel in his effort to establish a record or to justify the ordering of a transcript in proceedings involving leave to appeal *in forma pauperis*. Third are the costs of time, effort, and expense of assigned counsel. The present system is able to function at all only by shifting a large part of the burdens of the system on lawyers who are required to serve without compensation or reimbursement. It should be carefully noted that in a system of adequate representation involving the use of compensated counsel the shifting of many of these burdens to counsel will no longer be possible. In many cases the provision of a transcript at the outset of the appellate process will involve substantially less expense to the government than the payment of attorneys' fees for time spent by counsel in an effort to settle a record for disposition of the application to appeal *in forma pauperis* and in other proceedings made necessary by the present system. Fourth, a system that obstructs access to direct review is likely to encourage resort by prisoners to collateral attack on their convictions and sentences with losses of time and money thereby occasioned. Such has been the uniform experience of state systems of criminal justice. We have already noted that one of the consequences of the liberal review procedures

in the administration of military justice has been the almost complete absence of collateral attacks on sentences imposed by courts martial. (Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963), pp. 122-123.)

Essentially the same conclusion was reached in the recent Tentative Draft Report on Standards Relating to Criminal Appeals of the Advisory Committee on Sentencing and Review under the American Bar Association Project on Minimum Standards for Criminal Justice, where it was concluded that methods should be adopted in preparation of records for appeals that will minimize the cost of preparation in terms of money and time, and at the same time defendants appealing in forma pauperis should be supplied transcripts at government expense. (See, Tentative Draft on Standards Relating to Criminal Appeals, American Bar Association Project on Minimum Standards, §3.3, pp. 83-91 (1969).)

3. Rules 10 and 35 Have Been Administered in a Fashion Which Denied Petitioner His Constitutional Right to a Transcript.

Even if this Court were not to declare Rules 10 and 35 unconstitutional on their face for the reasons set forth above, this Court would be justified in concluding that the manner in which the Rules have been applied to petitioner in this case have denied him the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. Even if a statute be fair on its face, if it be administered with an evil eye and an unequal hand,

it may result in a denial of equal protection (see, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74). Rule 10(c) of the California Rules of Court requires that even in multiple defendant cases—where each defendant is not entitled to his own copy of the transcript as a matter of right—that one copy "shall be made available for the use of the parties to the appeal in such manner as the judge, or the clerk under his direction, shall prescribe."

In the instant case, neither the trial judge nor his clerk made any effort to insure that the transcript would be fairly shared by petitioner and his co-defendant Pollard. Indeed, the transcript was sent to Pollard alone, and Pollard thereafter refused and still refuses to make the transcript available to petitioner. Where the State of California neglects to enforce its own rules so as to require co-defendants to share transcripts where it has denied them their own transcripts, it must, as a matter of basic fairness, make a duplicate transcript available to the co-defendant who has been denied the opportunity to review his transcript. Failure to do so constitutes an obvious denial to petitioner of equal protection.

The State cannot be heard to contend that the standard of equality established by this Court in *Griffin* and the cases which have followed it is satisfied by lending the prosecution's copy of the trial transcript to the defendant's appellate counsel for a limited period of perusal as a matter of administrative grace. Such an arrangement—dependent solely on the discretion of the prosecutor as to times at which and circumstances under which a defendant or his counsel may inspect the transcript—certainly cannot be said to afford an indigent the same rights as a defendant

who can pay for his transcript. This Court has in the past recognized the many burdens imposed upon court-appointed counsel for indigents, and the necessity for furnishing such counsel with easy access to complete trial transcripts. (See, *Hardy* v. *United States,* 375 U.S. 277, and Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783, 792-93 (1961), and the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963), p. 114, quoted from extensively in the majority and concurring opinions in that case.) Furthermore, the procedure of lending a transcript to petitioner's court-appointed appellate counsel gave the petitioner no opportunity to object to errors in the transcript before it was certified correct by the trial judge, nor did it give him access to the transcript after his appellate counsel had withdrawn from the case—either to prepare his own petition for rehearing or for a hearing before the California Supreme Court.

Thus, in summary, it is clear that the lending of a transcript in the manner afforded in this case deprives an indigent defendant of a number of advantages available to one who can afford to pay for a transcript, including, among others:

(1) The ability to review and object to the accuracy of the transcript before it is transmitted to the appellate court.

(2) The unrestricted access to the transcript in preparing his case on appeal, including preparation of a reply brief.

(3) The availability of the transcript for preparation of a petition for rehearing or for hearing before the California Supreme Court.

As stated by this Court in *Draper* v. *Washington*, 372 U.S. at 496: "the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a non-indigent defendant with similar contentions." This the temporary lending of a transcript clearly does not do.

B.

Having Been Denied a Trial Transcript for Use in Connection With His Appeal, Petitioner Is Not Required to Set Forth the Specific Bases for Attacking His Original Conviction as a Condition Precedent to Obtaining the Transcript in a Post-Conviction Proceeding.

1. The Decisions of This Court Recognize That a Defendant Need Not Set Forth Specific Grounds for Reversal of His Conviction as a Condition Precedent to Obtaining a Copy of a Transcript.

As heretofore indicated, petitioner has been unconstitutionally denied the right to a transcript for the purpose of direct review of his conviction. But this is not petitioner's sole basis for claim to a transcript. He is continuing to be denied a transcript for purposes of obtaining meaningful post-conviction review of his original state conviction. As to this later basis for claim, there is no need to first show grounds for reversal of his original state conviction before becoming entitled to a transcript.

The decisions of this Court make clear that an indigent defendant's constitutional right to demand a transcript is not confined to proceedings related to review of his initial direct appeal of his conviction, but extends as well to post-

conviction proceedings—at which time he may demand and be entitled to receive a transcript related to his initial proceedings without the necessity of first setting forth specific grounds for reversal of his conviction. (See, *Lane* v. *Brown*, 372 U.S. 477 (1963); *Long* v. *District Court of Iowa*, 385 U.S. 192 (1966); *Roberts* v. *LaVallee*, 389 U.S. 40 (1967).)

Indeed, in *Lane* v. *Brown, supra,* although the indigent defendant alleged four substantive grounds for attacking his conviction, the courts found it necessary to examine only his claim that he had been denied a transcript.

The Court of Appeals in this case concluded that to give petitioner a copy of the transcript at this stage in the proceedings without any prior showing by him of errors in the proceedings which led to his conviction would simply be permitting him to comb the record in the hope of discovering some flaw, and this he should not be permitted to do.

The Court of Appeals felt that it had support for this position in certain federal court decisions dealing with the entitlement of an indigent defendant in the federal courts to a transcript. However, this Court has construed the statutory provisions which presently govern the rights of an indigent in the Federal courts to a transcript (28 U.S.C. §§753(f), 1915) to require the furnishing of a free transcript to an indigent defendant unless the Government sustains the burden of showing that an appeal is so lacking in merit that the appellate court would dismiss the case as frivolous on the Government's motion had the case been docketed and had a record been filed by an appellant able to pay the expense of complying with these requirements, *Coppege* v. *United States*, 369 U.S. 438. See also, *Ellis* v.

United States, 356 U.S. 674. Indeed, when, as here, new counsel has been appointed to represent an indigent on appeal, this Court has construed these statutory provisions to require the furnishing of a complete transcript to the new counsel so that he can properly carry out his duties as advocate for his client. *Hardy* v. *United States,* 375 U.S. 277. Certainly an indigent defendant, who has never himself seen the transcript of his trial, which occurred nine years ago, and who in addition has no counsel to assist him in reviewing the proceedings in his case should be entitled to no less.

It will not do to say that petitioner has already had adequate opportunity to review the transcript through his court-appointed appellate counsel. That counsel—who had not participated in the trial of the case—voluntarily requested permission to withdraw, from the case on appeal, and thereafter petitioner was not in a position to review the record himself for the purpose of prosecuting his own appeal or to take further steps to secure a rehearing or a hearing in the California Supreme Court.

Suffice it to say that this Court has as recently as this Term recognized the importance to a trained lawyer of a transcript in the preparation of an appeal, and the even greater importance of a transcript to a layman. In *Gardner* v. *California,* 393 U.S. at 369-70, this Court recognized the importance of a transcript of a prior proceeding to a layman in a de novo application, stating:

> "But we deal with an adversary system where the initiative rests with the moving party. Without a transcript the petitioner, as he prepared his application to the appellate court, would have only his own lay memory of

what transpired before the Superior Court. For an effective presentation of his case he would need the findings of the Superior Court and the evidence that had been weighed and rejected in order to present his case in the most favorable light. Certainly a lawyer, accustomed to precise points of law and nuances in testimony, would be lost without such a transcript, save perhaps for the usual and exceptional case. The lawyer, having lost below, would be conscious of the skepticism that prevails above when a second hearing is sought and would as sorely need the transcript in petitioning for a hearing before the appellate court as he would if the merits of an appeal was at stake. A layman *a fortiori* needs the transcript even more."

The necessity of making a transcript available to permit a meaningful review becomes obvious when it is recalled that the proceedings under review occurred nine years ago this fall. Even the best trained of lawyers would find it difficult if not impossible to review proceedings at such a remote date without the benefit of at least the transcript of the proceedings.

2. To Condition Petitioner's Right to a Transcript on a Showing of Grounds for Reversal of His Conviction Would Deprive Him of Due Process and the Equal Protection of the Laws.

To require petitioner to state grounds for reversal of his conviction as a prerequisite to obtaining a transcript of his trial would discriminate unfairly between two classes of defendants seeking to obtain for the first time free copies of their trial transcript—in the first instance for the pur-

pose of direct attack upon their state convictions, and in the other, for collateral attack upon such convictions.

More specifically, in California an indigent defendant tried alone and convicted of a felony becomes entitled to a free copy of his trial transcript merely by filing a timely notice of appeal. Such a person need not set forth grounds for reversing his conviction or any grounds at all; as stated, his trial transcripts become his property automatically. By contrast, a defendant such as petitioner, who has not obtained a free copy of his trial transcript prior to seeking collateral review, but is still in the identical position of seeking to obtain these transcripts for the first time, would, according to the Court of Appeals below, be required to state grounds for reversal of his conviction before free transcripts would be provided. The result would be, in a state such as California, that defendants such as petitioner would be discriminated against by the state vis-a-vis defendants seeking transcripts for direct review.

The discrimination between indigent defendants described above is not, however, the only kind of discrimination arising from the conditioning of free transcripts to a defendant (seeking to collaterally attack his conviction) upon his stating grounds for reversal of conviction. Another form of discrimination by the state, of perhaps a more invidious nature, is that between indigent defendant and monied defendants, both of whom are seeking to collaterally attack convictions. The latter group may purchase their trial transcripts by providing nothing more than the purchase price. Armed with their transcripts and ordinarily represented by counsel, the monied defendant may then proceed with the difficult task of seeking reversal of

his conviction by the collateral proceedings established by state law.

The indigent defendant pursuing collateral attack, on the other hand, is without the aid of court-appointed counsel.[4] In this posture he is told by the State that a different rule for transcript access applies to him than for a monied defendant: The indigent defendant must set forth grounds for reversal of his conviction before transcripts will be made available. It is precisely this kind of discrimination that this Court has heretofore struck down. (See *Draper* v. *Washington, supra; Eskridge* v. *Washington State Board of Prison Terms and Paroles, supra; Lane* v. *Brown, supra.*)

Conclusion

As has been recognized by this Court, "No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal procedures. The methods we employ in the enforcement of our criminal law have been aptly called the measures by which the quality of our own civilization may be judged." *Coppege* v. *United States,* 369 U.S. 438, 449.

The furnishing to an indigent defendant of a copy of the transcript of the proceedings taken against him has been

[4] Since an indigent defendant can file an indefinite number of successive writs of habeas corpus to collaterally attack the conviction it may not be feasible to provide him with free counsel in filing such petitions. A similar argument certainly cannot be made with respect to providing an indigent defendant with a free trial transcript at least once for purposes of attacking his conviction.

recognized by this Court as a necessary part of any proceeding which can be characterized as fair. The burden on Government of furnishing such a transcript is minimal at best, particularly in view of the techniques of high-speed, low-cost document reproduction which are now available. Any society which views itself as truly free can afford such a minimal burden.

The decision of the Court of Appeals for the Ninth Circuit should be reversed and the case remanded with a direction that the writ of habeas corpus issue on condition that it be set aside if the State of California forthwith furnishes petitioner with a copy of the complete transcript of the proceedings in his case to date and the opportunity for a new appellate review of his original conviction in the state courts.

Respectfully submitted,

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APPENDIX A

Rules 10 and 35 of California Rules of Court

Rule 10. Transmission and Filing of Record

(a) [Filing and payment of fee] When the record on appeal has been completed in accordance with these rules the clerk shall forthwith transmit any original transcripts or agreed or settled statements to the reviewing court. When these are received the clerk of the reviewing court shall notify the appellant that the filing fee shall be paid within 20 days from the date of mailing such notice, and on such payment the record shall be filed. After the expiration of such 20-day period the clerk shall not permit the filing of the record except by direction of the Chief Justice or Presiding Justice. If the appellant shall fail to perform any act necessary to procure the filing of the record or to pay the filing fee within the time allowed therefor or within any valid extension of that time, and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed on motion of the respondent or on the reviewing court's own motion.

(b) [Transmission of exhibits] When the parties shall have been notified by the clerk of the reviewing court that an appeal has been set for hearing, each party shall file with the clerk of the superior court a notice specifying such of the original exhibits or affidavits designated by any party for inclusion in the record, as he desires transmitted to the reviewing court, and the clerk shall immediately transmit them to the reviewing court. The clerk of the superior court shall arrange and list them, and two duplicates of such list shall be forwarded with them. If the list is found correct, one duplicate shall be signed by the clerk of the reviewing court and returned to the clerk of the superior court. If any papers are illegible or otherwise unusable, the reviewing court may require that copies be

made and filed. The reviewing court at any time may order that any original exhibits or affidavits designated by the parties as a part of the record be transmitted to it by the clerk of the superior court. The reviewing court on application may order that original exhibits or affidavits be sent to the superior court for use in any other proceeding, and on the issuance of the remittitur, they shall be returned to the superior court.

(c) [Use of copies] The additional copy of the record required by these rules shall be made available for the use of the parties to the appeal in such manner as the judge, or the clerk under his direction, shall prescribe; provided that the parties may stipulate to its use, and in such event only the original need be filed with the clerk of the superior court.

Rule 35. Preparation, Certification and Filing of Record

(a) [Clerk's transcript] On the filing of the notice of appeal the clerk shall prepare an original and two clearly legible typewritten copies of the clerk's transcripts, in the manner and form required by rule 9, and shall append to the original and each copy a certificate that it is correct. An additional copy of the transcript shall be prepared for the district attorney when a judgment of death has been rendered against any defendant or upon the request of the district attorney. When there is more than one appealing defendant in a case in which a judgment of death has been rendered against one or more of the defendants, the clerk shall prepare an additional copy of the transcript for each such additional defendant. As amended, effective Jan. 1, 1959; Jan. 1, 1961.

(b) [Reporter's transcript] Where a reporter's transcript is required, the clerk, immediately on the filing of the notice of appeal, shall notify the reporter. The reporter shall prepare an original and the same number of

clearly legible typewritten copies of the reporter's transcript as are required of the clerk's transcript by subdivision (a) of this rule, in the manner and form required by rule 9, and shall append to the original and each copy a certificate that it is correct. He shall deliver the original and all the copies to the clerk immediately on their completion, and in no case more than 20 days after the filing of the notice of appeal, unless such time is extended as provided in subdivision (d) of this rule. As amended, effective Jan. 1, 1959.

(c) [Certification] As soon as both the clerk's and reporter's transcripts are completed, the clerk shall deliver one copy to the defendant or his attorney and one copy to the district attorney, and note the dates of such deliveries on the original. When there are two or more appealing defendants in a case in which a judgment of death has been rendered against one or more of the defendants, the clerk shall deliver a copy of both transcripts to each such defendant or his attorney. Promptly thereafter, and in no case longer than 25 days after the filing of the notice of appeal, unless an extension is granted pursuant to subdivision (d) of this rule, the clerk shall deliver the original transcripts to the judge for his approval. Unless a proposed correction is served and filed within five days after the delivery of the original transcripts to the judge, the judge shall certify on the original that no objection was made thereto within the time allowed by law, and shall immediately redeliver the transcripts to the clerk. If a proposed correction is filed, the judge shall promptly determine the matter. After corrections have been made, the judge shall certify that all objections made thereto have been determined, and that the transcripts have been corrected in accordance with such determination, and shall redeliver the transcripts to the clerk. Where there are two or more appealing defendants represented by separate counsel in a case in which judgment of death has not been rendered against any defendant, the appellant's copy shall be made

available for the use of the appellants in the manner provided in rule 10. As amended, effective Jan. 1, 1959.

(d) [Extensions of time] The periods allowed by this rule for preparation of the record shall not be extended by the superior court, but on affidavit showing good cause, the reviewing court may extend time for not exceeding 60 days in the aggregate.

(e) [Transmission] Promptly on receipt of the record properly certified by the judge, the clerk shall transmit the original transcripts to the clerk of the reviewing court. He shall also transmit to the Attorney General a copy of each transcript corrected to conform to the original. Unless a judgment of death has been rendered against any defendant or the district attorney has requested a copy of each transcript for his permanent use, the district attorney shall deliver to the clerk the copy of each transcript furnished the district attorney under subdivision (c) of this rule. The date of transmission of copies to the Attorney General shall be noted on the original transcripts by the clerk of the superior court. All exhibits admitted in evidence or rejected which are made part of the record on appeal by rule 34 or by order of the superior court pursuant to rule 33 shall be transmitted to the reviewing court as originals as provided in rule 10. If any exhibits were requested, but the superior court failed to make an order pursuant to such request, such exhibits shall be transmitted only on order of the reviewing court. As amended, effective Jan. 1, 1959; Jan. 1, 1961.

(f) [Stipulation for partial transcript] If counsel for both defendant and the People stipulate in writing before the preparation of the record is completed that any part of the record is not required for the proper hearing of the appeal, such part shall not be prepared or transmitted to the reviewing court.

APPENDIX B

Compilation of State Statutes and Rules Providing for Furnishing of Transcripts to Indigent Co-Defendants

The following table indicates those states in which the obligation to supply a transcript for the purpose of appeal to each indigent defendant in a felony case is recognized by statute or court rule, and those states (other than California) in which a transcript is required to be shared by co-defendants by statute, court rule or administrative interpretation. The table also reflects responses to a letter of inquiry sent to the Attorneys General of all such states requesting confirmation as to the manner in which their respective statutes or court rules are in fact administered with respect to the furnishing of individual transcripts to each indigent co-defendant on direct appeal. As of the date of filing this brief, replies had been received from 33 of the 50 states, of which 4 indicated they could not furnish the information requested.

State	Applicable Statute or Court Rule	Transcript Provided to Each Indigent Defendant Pursuant to Statute or Court Rule	Multiple Defendants Share Transcript Pursuant to Statute or Court Rule	Multiple Defendants Share Transcript as Matter of Administrative Practice	Unacc
ALABAMA	Ala. Code Title 15, § 380(20) (1958)	X			
ALASKA	Sup. Ct. 243(b) (1968)	X			
ARIZONA	Ariz. Rev. Stat. Ann. § 13-1714 R. Crim. Pro. 361(b)			X[2, 3]	
ARKANSAS	Ark. Stat. Ann. § 22-357 (1947)	X[1, 2, 12]			
COLORADO	None	X[1, 4]			
CONNECTICUT	Conn. Gen. Stat. Ann. § 54-151 (1967)	X			
DELAWARE	Sup. Ct. R. 10A (1959)	X[12]			
FLORIDA	Fla. Stat. Ann. §§ 924.15, 924.17, 924.23, 924.25	X[1, 4]			
GEORGIA	Ga. Code Ann. §§ 6-805, 6-811		X		
HAWAII	Hawaii Rev. Stat. § 705-5 (1967)	X[1]			

State	Applicable Statute or Court Rule	Transcript Provided to Each Indigent Defendant Pursuant to Statute or Court Rule	Multiple Defendants Share Transcript Pursuant to Statute or Court Rule	Multiple Defendants Share Transcript as Matter of Administrative Practice	Unsettled
...EO	None	X[5]			
...INOIS	Ill. Ann. Stat. § 110A-607 (1967)	X			
...IANA	Ind. Stat. Ann. § 4-7309 R. Sup. Ct. 2-40A (1963)	X[1]			
...A	Iowa Code Ann. § 793.8	X			
...NSAS	Kan. Stat. Ann. § 62-1304 (1968) § 60-2701, No. 6(M)	X[12]			
...TUCKY	Ky. Rev. Stat. § 453.190 R. Crim. Pro. 12.63, 12.66		X[1]		
...SIANA	La. Stat. Ann. § 13:4529 Code of Crim. Pro. act. 917[6] Sup. Ct. R. 1(6)	X[1]			
...E	R. Crim. Pro. 39A (1965)	X[1]			
...LAND	Md. Crim. Code R. 883(b), 1083(b) (1967)	X			

State	Applicable Statute or Court Rule	Transcript Provided to Each Indigent Defendant Pursuant to Statute or Court Rule	Multiple Defendants Share Transcript Pursuant to Statute or Court Rule	Multiple Defendants Share Transcript as Matter of Administrative Practice	Unsettled
MASSACHUSETTS	Mass. Ann. L. Ch. 278, §§ 33A-33H				X
MICHIGAN	Superior Ct. R. 785.4(2)	X			
MINNESOTA	Minn. Stat. Ann. §§ 611.07(3) (1965)	X[7, 12]			
MISSISSIPPI	Miss. Code Ann. § 1640(f)	X			
MISSOURI	Mo. Stat. Ann. § 485.100	X[1]			
MONTANA	Mont. Codes Tit. 95, Code of Crim. Pro. §§ 95-2428, 95-2429 (1968)	X[1]			
NEBRASKA	Neb. Rev. Stat. §§ 24-342, 29-2306, 29-2306.1 (1964)	X[1]			
NEVADA	Nev. Rev. Stat. § 177.345	X[8, 12]			
NEW HAMPSHIRE	N.H. Rev. Stat. Ann. 604-A:1-8 R. Ct. 63, 64	X[1]			

State	Applicable Statute or Court Rule	Transcript Provided to Each Indigent Defendant Pursuant to Statute or Court Rule	Multiple Defendants Share Transcript Pursuant to Statute or Court Rule	Multiple Defendants Share Transcript as Matter of Administrative Practice	Unsettled
JERSEY	N.J. Stat. Ann. §§ 2A:152-15, 2A:152-16, 2A:152-17	X[12]			
MEXICO	N.M. Stat. § 21-2-1(14) (1953)		X[1]		
YORK	N.Y. Code Crim. Pro. § 456 (1962)	X			
CAROLINA	N.C. Gen. Stat. § 15-4.1 (1965)			X[2, 12]	
DAKOTA	None				X[9]
	Ohio Rev. Code Ann. §§ 2301.24 2953.03 (1965)	X[12]			
OMA	Okla. Stat. Ann. Tit. 20, § 106.4(b)	X[12]			
	Ore. Rev. Stat. § 138.500(2), (3)	X[12]			
VANIA	Pa. Stat. Ann. 17 § 1802, § 1809, 42 § 1140	X[1]			
ISLAND	None				

State	Applicable Statute or Court Rule	Transcript Provided to Each Indigent Defendant Pursuant to Statute or Court Rule	Multiple Defendants Share Transcript Pursuant to Statute or Court Rule	Multiple Defendants Share Transcript as Matter of Administrative Practice
South Carolina	S.C. Code L. §§ 7-343, 15-1903 (1962)	X		
South Dakota	S.D. Code of 1939 1960 Supp. §§ 34.1901, 34.3903	X[12]		
Tennessee	Tenn. Code Ann. §§ 40-2037, 40-2040			
Texas	Tex. Code Crim. Pro. Art. 40.09 (5) (1967)	X		
Utah	Utah Code Ann. §§ 78-56-4, 78-56-9 (1957)	X[12]		
Vermont	Vt. Stat. Ann. Tit. 4, §§ 733, 737	X[12]		
Virginia	Va. Code § 17-30.1 (1968)	X[1]		
Washington	Wash. Rev. Code Ann. §§ 2.32.240, 10.01.112 (1965) Ct. R. 44, 46, 47	X[1, 12]		

State	Applicable Statute or Court Rule	Transcript Provided to Each Indigent Defendant Pursuant to Statute or Court Rule	Multiple Defendants Share Transcript Pursuant to Statute or Court Rule	Multiple Defendants Share Transcript as Matter of Administrative Practice	Unsettled
West Virginia	W. Va. Code § 51-7-7 (1965)	X			
Wisconsin	Wisc. Stat. Ann. § 256.57 (1967)				X[12]
Wyoming	Wyo. Stat. § 7-282.1 (1967) R. Civ. Pro. 1, 75(1)	X[1]			

[1] Confirmed by letter from Attorney General's office.
[2] Practice indicated by reply from Attorney General's office.
[3] Judge has discretion to award individual transcripts—Attorney General's letter.
[4] Unless joint appeal is taken—Attorney General's letter.
[5] There is no statute or court rule directly in point, but the Attorney General's office indicated that free individual transcripts are provided as a matter of practice.
[6] As interpreted by Op. Atty. Gen., June 14, 1965.
[7] In joint trials—Attorney General's letter.
[8] The post-conviction procedure provides for individual free transcripts, but no provision specifically relating to appeals was found.
[9] There is no applicable statutory provision. In response to our inquiry, the Attorney General's Office indicated that the issue of free transcripts to co-defendants has not yet been resolved.
[10] The statutory provisions seem to provide for individual copies of the trial transcript, but in response to a question whether each indigent defendant in a criminal case was permitted a transcript, the Attorney General indicated trial courts probably provide only one transcript, although the question has not been submitted to Tennessee's appellate courts.
[11] Transcript is sent to Warden of prison; no indication in statute or Attorney General's letter of practice absent incarceration.
[12] Some inquiry beyond the presence or absence of indigency is provided for before providing a transcript.

APPENDIX C

(See opposite) ☞

Appendix C

Statistics as to California
Criminal Cases Involving
Multiple Defendants

Multiple Defendants in Superior Court Criminal Cases Filed

	1964-65 Sample			1968 Sample		
	State	Los Angeles county	Other counties	State	Los Angeles county	Other counties
cases	5,440	2,516	2,924	11,005	4,667	6,338
defendants	6,611	2,969	3,642	13,449	5,671	7,778
of defendants 100 cases	122	118	125	122	122	123
1 defendant	4,565			9,163		
2 "	677			1,425		
3 "	139			296		
4 "	36			84		
5 "	15			25		
6 "	3			7		
7 "	1			1		
8 "	1			2		
9 "	2					
10 "	1			1		
11 "						
12 "				1		

of 1964-65 cases were Los Angeles, San Bernardino, San Diego, Santa Barbara, , San Francisco, Santa Clara, Contra Costa, San Mateo, Fresno, and Monterey counties

of 1968 cases included the above counties plus 12 other scattered counties with populations.

Bureau of Criminal Statistics
May 1, 1969

FILE COPY

No. 55

FILED
AUG 18 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM 1969

WILLIE WADE, JR.,
Petitioner,

vs.

LAWRENCE E. WILSON, Warden, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM 1969

No. 55

WILLIE WADE, JR., *Petitioner,*

vs.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for the Respondents

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Wilson v. Wade,* 390 F.2d 632 (9th Cir. 1968), and is reprinted on pages 50-52 of the Appendix filed in this action.

The order of the United States District Court for the Northern District of California granting the petition for writ of habeas corpus on June 5, 1967, is not reported but is reprinted on pages 44-45 of the Appendix filed in this action.

JURISDICTION

The jurisdiction of this Court to review a judgment of a Court of Appeals arises under Title 28, United States Code, section 1254(1). The petition for writ of certiorari was granted on February 24, 1969. 393 U.S. 1079.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Constitutional provisions, statutes and California Rules of Court, which are relevant to this action are set forth at length in appendix A of this brief.

QUESTION PRESENTED

Does an indigent state prisoner who has been afforded direct appeal with counsel and use of the appellate record have a further federal Constitutional right to be provided at state expense records of the proceedings which resulted in his custody, to be used solely for the purpose of discovering whether there may be grounds for collateral attack in a state or a federal court?

STATEMENT OF THE CASE

A. Proceedings in the State Courts.

1. THE TRIAL COURT:

On November 1, 1960 petitioner, Willie Wade, Jr., and a codefendant, Joseph Pollard, were sentenced in the Superior Court of the State of California for the County of Los Angeles to life imprisonment upon their conviction of murder (A. 37). Petitioner and his codefendant were convicted by a jury which determined the murder to be of the first degree and fixed petitioner's penalty at death (A. 37). This penalty was reduced to life imprisonment by the trial

dge when he denied petitioner's motion for a new trial A. 37). Petitioner was represented by counsel at trial (A. 7).

THE COURT OF APPEAL:

Petitioner and Pollard each commenced proceedings on ppeal (A. 18, 24). Petitioner was represented on appeal y appointed counsel, Burton Marks, Esq. (A. 7, 18). On ugust 17, 1961 the California Court of Appeal affirmed etitioner's conviction (A. 11). *People v. Pollard*, 194 Cal. App.2d 830, 15 Cal.Rptr. 214 (1961). It appears that the lerk of the trial court sent appellants' single copy of the ecord on appeal first to Pollard[1] who subsequently declined to share it when requested to do so by Mr. Marks (A. 18). Mr. Marks then borrowed the record from the Office of the California Attorney General in Los Angeles for use on appeal, including preparation of the brief (A. 18).

3. COLLATERAL STATE PROCEEDINGS:

Some four years following the decision of the California Court of Appeal [in 1965 according to the brief for petitioner, page 5], Wade inquired and was advised by the clerk of the trial court that either Mr. Marks or the appellate court had the record on appeal (A. 11).

By letter dated May 6, 1966 Mr. Marks informed Wade that on Pollard's refusal to share the appeal record he had borrowed a copy of the record from the California Attorney General (A. 18).

Wade alleges he next sought help from his relatives but was unsuccessful because they were unable to pay for the

1. California Rules of Court, Rules 35(c) and 10(c) provide for a single copy of the record on appeal to be shared by multiple appellants in a non-death case. The full text of these Rules appears in the appendix of this brief.

record (A. 11). Wade then unsuccessfully requested the trial court, the California Court of Appeal, and the California Supreme Court to provide him various records, including the appeal record, without cost (A. 11-12, 19-30)[2].

B. Proceedings in the Federal Courts.

1. THE DISTRICT COURT:

On February 15, 1967 Wade's petition for a writ of habeas corpus was ordered filed forma pauperis in the United States District Court for the Northern District of California (A. 2, 3-30). On the same date the District Court issued an order to show cause returnable February 24, 1967 (A. 31). The petition alleged Wade's custody was unlawful because the State failed to honor his requests for free records which he made four years after his conviction was affirmed (A. 5, 10).

Respondent's return to the order to show cause was filed February 24, 1967 (A. 32-38) and Wade filed a traverse on March 22, 1967 (A. 1, 40-43).

On June 5, 1967 the District Court held that Wade was entitled to a free copy of the trial transcript to prepare a

---

2. Wade's requests for records were not confined to the Reporter's Transcripts of trial. He asked the California Court of Appeal for certified copies of:

"(1) The records of arrest or reports thereof.
(2) The records of the information.
(3) Records of arraignment.
(4) Records of the preliminary hearing.
(5) Records of the trial.
(6) Records of the sentencing." (A. 20).

Wade asked the California Supreme Court for the following records:

"(1) Records of the information.
(2) Records of the arraignment.
(3) Records of the preliminary hearing.
(4) Records of the trial/Reporter's Transcripts.
(5) Records of the sentencing.
(6) Records of the arrest/arrest reports/." (A. 25).

habeas corpus petition and ordered Wade released from custody, staying execution of the order for ten days to allow filing a notice of appeal. This order was also expressly without prejudice to the State to apply to have it set aside in the event the transcript of his trial were provided (A. 44-45). The sole issue resolved by the District Court was whether a state prisoner is entitled to a free transcript to prepare a petition for a writ of habeas corpus.

On June 15, 1967 the District Court ordered the matter stayed pending the determination of an appeal and on the same date respondent filed a notice of appeal (A. 46, 47).

2. THE COURT OF APPEALS:

Following the submission of the matter on the briefs filed by the respective parties, the United States Court of Appeals for the Ninth Circuit reversed the District Court in an opinion filed March 11, 1968 (A. 50-53). *Wilson v. Wade,* 390 F.2d 632 (9th Cir. 1968). The Court of Appeals reversed the District Court, holding that Wade was not entitled to demand the transcript merely to enable him to search for flaws and determining that Wade had not presented any ground for post-conviction relief the prosecution of which required him to have the use of the transcript (A. 51).

On May 3, 1968 the Court of Appeals denied Wade's petition for rehearing (A. 54).

SUMMARY OF ARGUMENT

Petitioner Wade appealed his conviction to the California Court of Appeal. An indigent, Wade was furnished at state expense with appellate counsel who used, also without cost to Wade, a copy of the trial record in presenting the appeal. Some four years after his conviction was affirmed, Wade unsuccessfully demanded from the California courts voluminous records, including the trial transcript.

The District Court, by way of relief to Wade, directed California to provide Wade with a copy of the trial transcript. No other relief was granted. The Court of Appeals held that although an indigent prisoner is entitled to a free transcript in order to prosecute a claim for post conviction relief where it is essential to permit demonstration of his right to relief, Wade "was not entitled to demand a transcript merely to enable him to comb the record in the hope of discovering some flaw [footnote omitted]." (A. 52).

The relief Wade seeks in this Court is not the same relief granted to him by the District Court. Here Wade asserts not only a right to a trial transcript but also a right to "a new appellate review of his original conviction in the state courts" (Petitioner's Brief, p. 26).

Wade's attack on the validity of his California appeal raises contentions not presented or passed upon by the District Court or the Court of Appeals; also the California courts have never been afforded the opportunity to consider these contentions which are urged for the first time in the brief in this Court.

The question before this Court is the asserted right of Wade, who has never stated grounds for collateral attack, to secure a copy of the trial transcript so as to conduct a search for error. For purposes of this review, Wade is in no different position than any other potential applicant for collateral relief claiming to be indigent and to be without a trial record.

Granting Wade's demand would establish for indigents unfettered privileges of post-conviction discovery which are not associated with any pending proceedings. The discovery privileges Wade demands would gravely burden government and the administration of justice in the several States.

An indigent should not be furnished records on collateral attack any more readily than counsel, an interest at least as vital. Indeed, the same considerations which now determine whether an indigent is furnished counsel should guide the determination of whether he be furnished a trial record. An indigent is entitled to counsel on habeas corpus only to advance apparently meritorious contentions. Accordingly, he should be furnished the trial record only when necessary to support apparently meritorious contentions.

ARGUMENT

I. The United States Constitution Does Not Require That an Indigent State Prisoner Be Provided a Free Copy of the Trial Record to Be Used for the Sole Purpose of Discovering Whether There May Be Grounds for Collateral Attack of His Conviction.

The California Court of Appeal reviewed petitioner's conviction upon the original trial record furnished to the reviewing court without charge to petitioner; petitioner's appointed appellate counsel used, also without charge to petitioner, a copy of the trial record for the purposes of presenting petitioner's appeal.

Petitioner has never filed a petition in any State or federal court collaterally attacking the validity of his conviction or challenging the fairness of the proceedings on appeal[3].

---

3. The substantial portion of Wade's brief on the merits filed in this Court is devoted to a discussion of how the application of Rules 10(c) and 35(c) of the California Rules of Court to Wade may affect the validity of his conviction by way of impairing his right to appeal. On Argument II, *infra*, we discuss at length the reasons why this Court should not entertain these arguments which appear for the first time in petitioner's brief. They were never raised by the parties nor discussed by the courts in the proceedings in the District Court and in the Court of Appeals. Similarly, these matters were not raised in the petition for writ of certiorari or in our opposition thereto.

Wade's interest in records in the courts below was not limited to a transcript of the evidence adduced at trial. His requests have covered records of all official actions taken against him up to the time of sentencing. Some of the records Wade has requested are listed on page 20 of the Appendix (his request for records directed to the California Court of Appeal) and on page 25 of the Appendix (his request for records directed to the California Supreme Court). He has indeed embarked upon a full scale fishing expedition.

A. NO ACTUAL NEED FOR THE TRIAL RECORD IS DEMONSTRATED WHERE NO CONTENTION IS URGED WHICH REQUIRES THE TRIAL RECORD FOR SUPPORT.

A State is not required to provide an indigent in its custody with free copies of the trial record at the whim of the indigent. The cases articulating an indigent's right to a free record are based on an actual and demonstrable need for the particular records requested; in each case the specific need is either set forth or is easily inferred from the circumstances.

In *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court discussed the importance of stenographic transcripts of trial proceedings to an indigent person's interest in prosecuting his right to full direct appellate review such as was afforded petitioner here. In holding that the due process and equal protection clauses of the Fourteenth Amendment require that the indigent defendant be provided such records without cost, this Court observed:

> "Counsel for Illinois concedes that these petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors. [footnote omitted]" 351 U.S. 16.

Indeed, the major premise of the *Griffin* decision is:

> "We must therefore assume for purposes of this decision that errors were committed in the trial which would merit reversal, but that the petitioners could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript." 351 U.S. at 16.

There is no basis, however, for such an assumption of trial error with regard to Wade whose conviction was affirmed after he was afforded a full direct appeal. Wade's conviction, therefore, is presumptively valid.

This Court in *Lane v. Brown,* 372 U.S. 477 (1963), ruled the Fourteenth Amendment requires that an indigent be provided a free record where filing the record is essential to perfecting an appeal from a denial of a petition for writ of error coram nobis where under applicable state law the filing of a transcript was essential to confer jurisdiction upon the appellate court. In *Long v. District Court of Iowa,* 385 U.S. 192 (1966), this Court held an indigent is entitled to a free transcript of habeas corpus proceedings for use on direct appellate review of those proceedings. The principles announced in *Long* were recently affirmed in *Gardner v. California,* 393 U.S. 367 (1969), where the transcript of habeas corpus proceedings resulting in a denial of the petition was determined important, not to direct appellate review of those proceedings, but to the prosecution of a new petition for habeas corpus filed in a higher court[4]. In deciding *Gardner,* this Court reasoned

4. Under California practice, the petitioner for a writ of habeas corpus has no appeal where his petition was denied. Rather, the petitioner may file a new petition for habeas corpus in a higher court which in Gardner's case would be either the intermediate Court of Appeal or the California Supreme Court. See *Gardner v. California, supra,* 393 U.S. at 603.

that filing a second petition for habeas corpus in a higher court effectively commences a proceeding on review and found there was an actual need for the transcript of the original habeas corpus proceedings:

> "Since our system is an adversary one, a petitioner carries the burden of convincing the appellate court that the hearing before the lower court was either inadequate or that the legal conclusions from the facts deduced were erroneous. A transcript is therefore the obvious starting point for those who try to make out a case for a second hearing." 393 U.S. at 370.

Griffin concerns an indigent's right to records of his trial proceedings for the purpose of prosecuting direct appellate review of those proceedings. *Lane, Long* and *Gardner* involve an indigent's right to transcripts of proceedings on collateral attack to be used to prosecute review of those proceedings. In each instance the specific need for the particular records is apparent.

In *Roberts v. LaVallee,* 389 U.S. 40 (1967), the Court was confronted with a request for records to be used in criminal proceedings occurring before judgment. When Roberts' case was called to trial in New York State, he requested the Court furnish him at state expense with a transcript of a prior preliminary hearing at which the major state witness had testified. In determining the trial court's denial of Roberts' request was repugnant to the Constitution this Court stated:

> "Our decisions for more than a decade now have made clear that difference in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution. See, *e.g., Draper v. Washington,* 372 U.S. 487 (1963); *Griffin v. Illinois,* 351 U.S. 12 (1956)." 389 U. S. at 42.

The statement in Mr. Justice Harlan's dissenting opinion to the contrary notwithstanding[5], it seems entirely understandable that Roberts' interest in the transcript of the preliminary hearing would relate to his preparation of cross-examination at trial of the principal prosecution witness who would testify against him. Accordingly, as was true in each of the other cases discussed above, in *Roberts* there was an apparent specific need for the particular record requested.

We hasten to point out that even if Roberts' interest in the transcript did not reflect an apparent specific need for it, the distinction between the circumstances surrounding Roberts' requests for records and those surrounding Wade's requests for records is so substantial and basic that this Court's opinion in *Roberts* would nevertheless afford Wade no comfort. Wade is presumptively guilty; Roberts was presumptively innocent. Wade is in custody under a presumptively valid judgment of conviction following a jury trial and which was affirmed on appeal. Roberts' request for records was made prior to his conviction during trial.

Where, as in the instant case, the conviction is presumptively valid and direct review proceedings have been completed, an indigent's indiscriminate, purposeless and arbitrary demand for documents need not be honored. The State, then, may properly call upon the indigent to come forward with some apparently meritorious ground for collateral attack upon which a determination of need for records can then be predicated.

---

5. Mr. Justice Harlan noted in his dissent in *Roberts* "... at no time has petitioner suggested any use to which the preliminary hearing transcript could have been put, although he is in a position to know what it contains." 389 U.S. at 43.

B. GRANTING PETITIONER'S DEMAND FOR RECORDS WOULD AFFORD INDIGENTS UNFETTERED DISCOVERY PRIVILEGES.

This Court has recently decided that a state prisoner enjoys no broad rights of discovery because he is a petitioner for a writ of habeas corpus. *Harris v. Nelson,* 394 U.S. 286 (1969). The petitioner in *Harris* had filed a petition for writ of habeas corpus with allegations sufficient to warrant an evidentiary hearing. Moreover, his proposed discovery interrogatories related to the issues to be litigated at the evidentiary hearing. Nevertheless, this Court held that such discovery is available only at the authorization of the District Court according to procedures reasonably fashioned by that Court to elicit facts to help it dispose of the matter as law and justice require. *Harris v. Nelson, supra,* 394 U.S. at 298-300.

The lower federal courts which have considered the matter have uniformly rejected the thesis that an indigent prisoner is entitled to free records to be used to *discover* whether he has grounds to collaterally attack the validity of his custody or to *prepare* a petition for such relief. See *Dorsey v. United States,* 333 F.2d 1015 (6th Cir. 1964); *Harless v. United States,* 329 F.2d 397, 398-399 (5th Cir. 1964); *Culbert v. United States,* 325 F.2d 920, 922 (8th Cir. 1964); *Ketcherside v. United States,* 317 F.2d 807, 808 (6th Cir. 1963); *United States v. Shoaf,* 341 F.2d 832 (4th Cir. 1964); *McGarry v. Fogliani,* 370 F.2d 42, 44 (9th Cir. 1966)[6].

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6. It is true that, except for *McGarry,* the above cases involve federal prisoners seeking relief under federal statutes. However, it has been accurately pointed out for example that the proceedings under Title 28, United States Code section 2255 sought to be commenced in *Harless, Culbert and Shoaf,* are a procedural substitute for habeas corpus so that the indigent prisoner's interests in free records would fall within the purview of the Fifth Amendment as Wade's interest in such records similarly falls within the purview of the Fourteenth Amendment. See *United States v. Shoaf,*

On the other hand, where the requested records would predictably be useful to *support* a particular claim there has been little hesitancy to provide them. See *e.g., United States v. Glass,* 317 F.2d 200 (4th Cir. 1963). See also *United States v. Shoaf, supra,* 341 F.2d at 836 where the Court concluded its opinion by stating:

> "If [a petition for collateral relief under Title 28, United States Code section 2255] should show some non-frivolous ground, he may incidentally ask for a copy of the transcript, and it, or the relevant portion, should be supplied to him if need for it is shown." 341 F.2d at 836.

The distinction between "needing" records to *discover* grounds for collateral attack and needing them to *support* known grounds has been set forth with clarity by the Court of Appeals in *Shoaf:*

> "This case differs from Hardy [*Hardy v. United States,* 375 U.S. 277 (1964)], of course, for here we are concerned with the indigent's rights in collateral proceedings, not in direct appeals, and the transcript is sought by the indigent for his own perusal rather than that of newly appointed counsel. Those differences require a different result."
>
> • • •
>
> "The usual grounds for successful collateral attacks upon convictions arise out of occurrences outside of the courtroom or of events in the courtroom of which the defendant was aware and can recall without the

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supra, 341 F.2d at 835-836. The Court in *Shoaf* also makes the point that while there is no equal protection clause in the Fifth Amendment the minimal standards of justice applicable under the due process clause should not be appreciably lower in the federal courts than the Federal Constitution requires in the state courts. *Ibid.* This would seem to be particularly true in view of the fact that a petitioner for collateral relief may be a state prisoner seeking records to attack the validity of a federal conviction affecting his custody or he may be a federal prisoner seeking records to attack the validity of a state conviction.

need of having his memory refreshed by reading a transcript. He may well have a need of a transcript or a partial transcript to support some ground of collateral attack, but rarely, if ever, would the defendant, himself, need a transcript of the trial to become aware of the events or occurrences which constitute a ground for collateral attack.

"These differences we think are crucial. Hardy's response to the general need for the transcript was not an abandonment of the Supreme Court's repeated refusal to hold that a transcript must be furnished every indigent who seeks direct or collateral review of his conviction. Shoaf, who has undertaken to show neither specific nor general need for a transcript, would be entitled to one at government expense only if that is a requirement in every case." 341 F.2d at 834-835.

Wade, of course, should not be permitted to ride the coattails of a circumstantial result of the application of Rules 10(c) and 35(c) of the California Rules of Court, which merely provide for the distribution of the original and copies of the appeal record, by claiming that were he a single appellant he would have actually received his own copy of the record on appeal for his permanent retention. The *Griffin* line of cases establishes an indigent's rights to free records as one of *access* to whatever records are needed to vindicate his legal rights. See *Roberts v. LaVallee, supra*, 389 U.S. at 42. Those cases do not establish a constitutional right in the nature of a property right to permanent retention of the documents. While it is true that in the case of multiple appellants, a circumstantial result of the California rules may be that not all of the appellants receive personal copies of the records for their individual permanent retention it is also true that they each have an enforceable right to access to the record for purposes of

prosecuting the appeal. The fact that at the conclusion of the appellate proceedings some appellants are able to retain the record while others do not is substantially irrelevant to the purpose of providing access to the record on appeal and to any established right under the Federal Constitution. The State is not required to place in an appellant's hands, literally, a copy of his trial record for his private use or non-use.

C. RECOGNITION OF PETITIONER'S DEMAND FOR RECORDS WOULD PLACE A GRAVE FINANCIAL AND ADMINISTRATIVE BURDEN UPON THE STATES WITHOUT A COMMENSURATE BENEFIT TO PETITIONER AND OTHER INDIGENTS SIMILARLY SITUATED.

California has not been derelict in providing free records to indigents convicted of crime. Indeed, it has long been the rule in California that on direct appellate review every defendant, rich or poor, has access without cost to the record. *People v. Smith*, 34 Cal.2d 449, 211 P.2d 561 (1949). Similarly, California has long provided free records to indigents on appeal from the denial of collateral relief. *In re Paiva*, 31 Cal.2d 503, 190 P.2d 604 (1948) (appeal from the denial of a petition for writ of error coram nobis). It is also the rule in California that indigents convicted of misdemeanors be provided free trial transcripts where necessary to present contentions on appeal. *Preston v. Municipal Court*, 188 Cal.App.2d 76, 10 Cal.Rptr. 301 (1961); *In re Henderson*, 61 Cal.2d 541, 393 P.2d 685 (1964).

We are aware of no interpretation of constitutional law which would require Wade be granted the relief he requests under the circumstances of record, and we urge that there is no justification to now read into the Fourteenth Amendment the establishment of broad rights to free records for indigent persons in custody. Because the papers filed by Wade in these proceedings have set forth no allega-

tions which would give a clue as to why he feels his continuing custody may be unlawful there is no basis for assuming any particular portion of the record of the proceedings which led to his custody is more important to him than any other. Accordingly, it is virtually impossible to impute any specific benefit to Wade were the State to have honored his request for free records.

On the other hand the financial burden on government and the burdens on the administration of justice would be enormous. Wade's analysis of the financial impact of such a rule, appearing on pages 16 and 17 of Petitioner's Brief, reflects only the number of indigent codefendants who would be furnished transcripts for collateral attack. A more realistic picture of this impact in California would be framed by remembering we are talking about discovering grounds and preparing petitions for collateral attack so that every person in custody, including those in the various state prisons, the county jails, persons on parole and persons on probation, would all be eligible to make blanket demands for records as Wade has.

On December 31, 1968, for example, the California state prison population consisted of over 24,000 adults, each being a potential habeas corpus applicant. A high percentage of these prisoners would, of course, be indigent; under Wade's theory each indigent would be entitled to demand free records to search for errors. Moreover, approximately 80 percent of these inmates do not appeal their convictions. Of the 12,721 adults sentenced to state prison during the calendar years 1966 and 1967 only 2,441, or 19.2 percent, appealed. Consequently, trial transcripts have never been produced for the vast majority of recently committed prisoners as well as for countless other prisoners who in past years forsook their appeals. The State would be

inundated with demands for trial records and would be burdened with the costs associated with transcribing and reproducing trial evidence even where there are no appeals and no claims of trial error by the prisoners. The States should hardly be required to waste their funds and energies by providing what is unnecessary. See *Draper v. Washington*, 372 U.S. 487, 496 (1963).

To the extent a prisoner's challenge of the validity of his custody relates to collateral attack of a conviction, it should be noted that many of these persons have suffered more than one conviction. The financial impact on government is, of course, vastly increased by including the costs which would have to be borne by all state governments, not to mention the costs which would be incurred by the federal government were the rule proposed by Wade held applicable to persons whose custody is affected by federal convictions.

It is also reasonably foreseeable the rule proposed by Wade would work to impose a tremendous burden on the maintenance of discipline in the various prison systems. The record in these proceedings suggests that Wade is a disgruntled prisoner who is unaware of any grounds cognizable in a state or federal court for regaining his freedom. If he were permitted to conduct a fishing expedition at state expense in search for grounds for collateral attack, it is not unreasonable to assume that he, and others like him, would seek the assistance of other inmates. It requires little imagination to envision the occurrence of frequent joint discussions among inmates pouring over one or several of their compatriots' complete set of records in a search for some plausible grounds to attack their presumptively valid commitments. The significance of such an imposition on prison discipline has been recognized as recently

as the following comment from the Court's opinion in *Johnson* v. *Avery*, 393 U.S. 483 (1969):

> "It is indisputable that prison 'writ writers' like petitioner are sometimes a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them. [Footnote omitted.]" 393 U.S. at 488.

The broad rights which Wade proposes be established would encourage not only the illiterate prisoner whose interests are protected by the opinion in the *Johnson* case, but would also encourage the vexacious literate prisoner to repeatedly file petitions and to continue to solicit the assistance and comments of other inmates in a search by trial and error for some plausible theory of relief.

D. THE SAME CONSIDERATIONS WHICH NOW DETERMINE WHETHER AN INDIGENT IS FURNISHED WITH COUNSEL TO ADVANCE HIS CONTENTIONS ON COLLATERAL ATTACK SHOULD GUIDE THE DETERMINATION OF WHETHER HE BE PROVIDED RECORDS.

There are distinctions between an indigent's rights at trial and on direct appeal and his rights on collateral attack. It is well settled, for example, that an indigent has a constitutional right to appointed counsel to represent him both at trial and appeal. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963); *Swenson* v. *Bosler*, 386 U.S. 258 (1967). Moreover, the indigent is entitled to have appointed appellate counsel prepare the appeal even where it may appear there is an absence of meritorious points to raise. *Anders* v. *California*, 386 U.S. 738 (1967).

An indigent's right to counsel on habeas corpus, however, is quite different: the right to counsel in such circumstances arises only following petitioner's invoking the court's discretion by presenting allegations which are

meritorious on their face. *Eskridge* v. *Rhay*, 345 F.2d 778, 782 (9th Cir. 1965), *cert. denied*, 382 U.S. 996 (1966); *Noble* v. *Sigler*, 351 F.2d 673, 678 (8th Cir. 1965), *cert.denied*, 385 U.S. 853 (1966); *Douglas* v. *Maxwell*, 357 F.2d 320, 321 (6th Cir.), *cert. denied*, 385 U.S. 858 (1966); *United States* v. *Wilkins*, 338 F.2d 404, 406 (2nd Cir. 1964). Indeed, this Court has recently recognized that:

> "It has not been held that there is any general obligation of the courts, state or federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief. [Citation omitted.]" *Johnson* v. *Avery, supra*, 393 U.S. at 488.

An indigent's right to counsel is different on collateral attack than it is at trial or on direct appeal because the conviction on which his custody is based is presumptively valid so that absent allegations meritorious on their face the need for this right is not apparent and there is no reasonable basis for assuming its existence. Indeed, in view of the presumptive validity of the conviction we assume there is an absence of such need.

The appointment of counsel rests on actual need to advance the apparently meritorious points raised. Likewise the entitlement to free records should rest on actual need to support contentions which are apparently meritorious.

II. This Court Should Not Review the Merits of Petitioner's Contention That Rules 10(c) and 35(c) of the California Rules of Court Have Deprived Him of Due Process and Equal Protection of the Laws.

Wade's argument that the validity of his appeal and, thus, of his continuing custody is impaired by the application of Rules 10(c) and 35(c) of the California Rules of Court appears for the first time in his brief on the merits

filed in this Court. An examination of the pleadings and briefs in the courts below, the order of the District Court (A. 44-45), and of the opinion of the Court of Appeals (A. 50-52) shows that the issue litigated was limited to whether Wade has a present right to a free trial transcript.[7] Indeed, there is no indication whatsoever that at the time of Wade's direct appeal either he or his counsel believed that codefendant Pollard's refusal to relinquish one copy of the record in any way impaired their ability to prosecute the points they wished to raise on appeal.

There are at least four reasons why this Court should decline to consider the arguments surrounding his appeal. First, these arguments were not decided by or submitted to the courts below. In exercising its appellate jurisdiction, in the absence of some exceptional circumstance, this Court has always been reluctant to determine issues neither decided by nor submitted below. See, e.g., *Lawn* v. *United States*, 355 U.S. 339, fn. 16 at 362-363 (1958). Wade does not urge in his brief that there is some exceptional circumstance justifying consideration of issues raised in the first instance at this stage of the proceedings.

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7. The opinion of the Court of Appeals sets forth the question presented as follows:

> "There is no doubt but that an indigent state prisoner is entitled to a free transcript for use in an appeal from his state conviction where that is needed and that he has a like right to a free transcript in order to prosecute a claim for post conviction relief where that is essential in order to permit him to demonstrate his right to such relief. See the cases cited in Roberts v. La Vallee, 389 U.S. 40, 42, . . . But the question here is whether Wade has presented any grounds for post conviction relief, the prosecution of which might require him to have the use of a trial transcript." 390 F.2d at 633.

Similarly, the order of the District Court states:

> "The question of entitlement to a transcript to prepare a petition for a writ of habeas corpus is one of first impression in this court, and the court concludes that he is so entitled." (A. 44-45).

Secondly, his arguments were neither raised nor comprised within the petition for writ of certiorari; this Court should decline to entertain them in deference to the language of Supreme Court Rule 23(1)(c) which provides in part:

> "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

Petitioner's statements of the "questions presented" appearing in his petition for writ of certiorari and in his response to our opposition are identical and read as follows:

> "1. Is it a denial of Due Process and Equal Protection of the law to deny Petitioner the trial transcripts and records in his case for the purpose of sueing[sic] for his liberty by Habeas Corpus, simply because he is an indigent person and has no money to pay for them?
>
> "2. Is it a violation of Petitioner's First Amendment right to Petition for redress of grievance, by placing a financial obstacle between him and the instrumentalities necessary to make that right adequate and effective;
>
> (a) If so, is the petitioner entitled to be discharged from confinement because of such a violation?"

The effect of Rules 10(c) and 35(c) of the California Rules of Court on the validity of Wade's appeal is not comprised within this statement and in accordance with Rule 23(1)(c) this Court should decline to consider the matter on its merits. See, *Namet* v. *United States*, 373 U.S. 179, 190 (1963); *Phillips Co.* v. *Dumas School Dist.*, 361 U.S. 376, fn. 12 at 387 (1960); *Carpenters' Union* v. *Labor Board*, 357 U.S. 93, fn. 1 at 96 (1958); *Lawn* v. *United States, supra*,

355 U.S. 339, fn. 16 at 363 (1958); *Irvine* v. *California*, 347 U.S. 128, 129 (1954).

Thirdly, by failing to raise the validity of Rules 10(c) and 35(c) of the California Rules of Court in a petition for writ of habeas corpus in a state court petitioner has failed to exhaust presently available state remedies with regard to that issue and therefore has failed to comply with Title 28, United States Code section 2254(b). The District Court would have been justified in declining to grant the writ on this basis had Wade raised the points in his petition for writ of habeas corpus and this is so without regard to how meritorious the points may be. It is particularly significant that there is no published opinion of a California court addressed to the validity under either the state or federal Constitution of the application of Rules 10(c) and 35(c) of the California Rules of Court to multiple appellants. This circumstance constitutes a particularly strong justification for this Court to decline to entertain these matters on their merits so that the California courts may have the opportunity to do so in the first instance.

Fourthly, had petitioner raised these matters in either the District Court or in the Court of Appeals we would have urged that federal review is barred by reason of his failure to have raised the matter in the state court during the proceedings on his direct appeal, thus constituting a deliberate bypass of presently available state remedies. See *Nelson* v. *People of State of California*, 346 F.2d 73 (9th Cir.), *cert. denied*, 382 U.S. 964 (1965); *Wilson* v. *Gray*, 345 F.2d 282 (9th Cir.), *cert. denied*, 382 U.S. 919 (1965); *Rhay* v. *Browder*, 342 F.2d 345 (9th Cir. 1965). As previously noted, it has long been the rule in California that on appeal a person such as Wade is entitled to free records without regard to his financial status. *People* v. *Smith*,

supra. Similarly, Rule 10(c) of the California Rules of Court provides the judge or clerk at his direction may prescribe the manner in which the single copy of the record on appeal will be made available to both appellants. Reading together the right established in the *Smith* case and Rule 10(c) it is clear that Wade had a right enforceable under then existing California law to access to the record on appeal for purposes of prosecuting the appeal. Had Wade, or his appellate counsel, been of the opinion that their use of a different copy of the record in any way impaired the prosecution of the points they wished to raise on appeal they need only have called this to the attention of the California court in order to obtain appropriate relief. However, on the face of the record filed in this Court it is most reasonable to assume that at the time of the proceedings on appeal neither Wade nor his appellate counsel had any such misgivings. Indeed, by their failure to have sought appropriate relief at the time of the proceedings on appeal we have an affirmative indication that Wade's bypass of available state remedies was deliberate.

Accordingly, in view of the absence of any exceptional circumstances justifying this Court's considering the arguments raised in the first instance in Wade's brief, and because there are compelling reasons for requiring him to give California state courts the first opportunity to litigate these questions, this Court should decline to consider the merits of this contention that Rules 10(c) and 35(c) of the California Rules of Court are unconstitutional either on their face or as applied to Wade.

III. Rules 35(c) and 10(c) of the California Rules of Court Are Not Unconstitutional on Their Face and Their Application to Wade's Appeal Did Not Deprive Him of Due Process or Equal Protection of the Laws Under the Fourteenth Amendment.

A. THE RULES OF COURT COMPLY WITH THE STRICTURES OF THE FOURTEENTH AMENDMENT.

The requirements of the Fourteenth Amendment are set forth succinctly in *Roberts* v. *LaVallee, supra,* 389 U.S. 40 (1967):

> "Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution. See, e.g., Draper v Washington, 372 US 487 . . . (1963); Griffin v Illinois, 351 US 12 . . . (1956)." 389 U.S. at 42.

California law has provided for over two decades that every convicted felon is entitled to access to a record on appeal regardless of his financial circumstances. E.g., *People* v. *Smith, supra,* 34 Cal.2d 449, 211 P.2d 561 (1949); *In re Paiva, supra,* 31 Cal.2d 503, 508, 510, 190 P.2d 604 (1948).

Where there are two or more defendants who appeal each has a right to full access to the record. Rule 35(c) of the California Rules of Court provides in part:

> "Where there are two or more appealing defendants represented by separate counsel in a case in which judgment of death has not been rendered against any defendant, the appellant's copy [of the Clerk's and Reporter's Transcripts] shall be made available for the use of the appellants in the manner provided in rule 10." Rule 35(c), California Rules of Court.

Rule 10(c) provides for appellant's use of his copy as follows:

"The additional copy of the record required by these rules shall be made available for the use of the parties to the appeal in such manner as the judge, or the clerk under his direction, shall prescribe; provided that the parties may stipulate to its use, and in such event only the original need be filed with the clerk of the superior court." Rule 10(c), California Rules of Court.

Reading the rules together with the California Supreme Court's interpretation of them in the *Smith* case and the *Paiva* case, every convicted felon in California is thereby entitled as a matter of right to access to a free record for purposes of prosecuting his appeal. More is not required by the Fourteenth Amendment.

B. THE RULES OF COURT WERE NOT UNCONSTITUTIONALLY APPLIED.

The California rules were not applied to Wade during the proceedings on his direct appeal in a manner which impaired his right to appeal.

Because this issue was not raised on its merits prior to the brief filed by petitioner in this Court, we are required to deal with an incomplete factual record. Wade, nevertheless, has made assertions of fact outside the record to present as strong a case as possible to this Court.

1. Wade alleges on page four of his brief that appointed counsel, "who was unfamiliar with the trial proceedings, was *forced* to prepare his brief on appeal by borrowing the transcript from his opponent, the California Attorney General (A. 18)." Wade's reference to page 18 of the Appendix reveals a letter to him by his appellate counsel wherein counsel does no more than recite the fact that he borrowed transcripts from the Attorney General in Los Angeles. It has never, of course, been urged that this copy of the record

varied from the original or the one in possession of co-defendant Pollard. Moreover, we do not know why counsel elected to borrow the record from the Attorney General rather than addressing a request for appropriate relief to the state court.

2. Similarly, Wade asserts on page twenty of his brief: "In the instant case neither the trial judge nor his clerk made any effort to insure that the transcript would be fairly shared by petitioner and his co-defendant Pollard . . . . Where the State of California neglects to enforce its own rule so as to require co-defendants to share transcripts where it has denied them their own transcripts, it must, as a matter of basic fairness, make a duplicate transcript available to the co-defendant who has been denied the opportunity to review his transcript."

Wade, of course, fails to mention that there is no indication that Pollard's reluctance to share the record on appeal was called to the attention of any court during the appellate proceedings. As we have noted above, an appellant in California has an enforceable right to access to the record on appeal.

3. Wade further alleges on page four of his brief that "petitioner's appellate counsel was, upon his own request, relieved as counsel *prior to* determination of petitioner's appeal (A. 11, 41)." There is no support in the record for this allegation. Indeed, Wade's reference to page eleven of the Appendix indicates the contrary is true. That reference directs this Court to a reproduction of Wade's petition for a writ of habeas corpus filed in the District Court where it is alleged: "The Appellate Court Affirmed the conviction of the Superior Court of Los Angeles County, on August 17, 1961, and relieved the court-appointed counsel on

his own request." This allegation does not indicate at what time subsequent to the decision counsel was relieved.[8]

4. Similarly, Wade claims on page 24 of his brief: "That counsel—who had not participated in the trial of this case—voluntarily requested permission to withdraw, from the case on appeal, and *thereafter* petitioner was not in a position to review the record himself for the purpose of prosecuting his own appeal or to take further steps to secure a rehearing or a hearing in the California Supreme Court." As we pointed out above, Wade's allegation in his petition filed in the District Court does not indicate at what time subsequent to the decision appellate counsel was relieved. Moreover, in view of the fact that appointed counsel on appeal was not relieved by the court prior to issuance of the remittitur on October 17, 1961, it is apparent that Wade was represented by counsel during the time within which a petition for rehearing could be filed in the Court of Appeal or a petition for hearing could be filed in the California Supreme Court.[9]

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8. Petitioner's counsel was not relieved prior to issuance of the remittitur on October 17, 1961. See Certificate of Clerk of California Court of Appeals, Appendix B to this brief.

9. Rule 27(b) of the California Rules of Court requires that a petition for rehearing be filed within fifteen days of the date of decision, Rule 28(b) of the California Rules of Court requires that any petition for hearing in the California Supreme Court be filed within ten days after the decision of the Court of Appeal becomes final and Rule 24(a) of the California Rules of Court provides that a decision on appeal becomes final thirty days after the date it is filed. Thus, a petition for rehearing would have had to have been filed by August 17, 1961 and a petition for hearing by September 26, 1961. In view of the fact that counsel on appeal was not relieved prior to the issuance of the remittitur on October 17, 1961, it is apparent Wade was represented by counsel during the period within which he could have filed these petitions.

The record filed in this Court is, of course, inadequate to permit a determination of the merits of Wade's points without also engaging in gross speculations. However, the record does clearly show that Wade had appointed counsel on appeal, that counsel had actual use of the record on appeal and that he in fact filed a brief.

Lastly, Wade indicates the failure of the state to provide him a copy of the record for his individual permanent retention operated to impair his Fourteenth Amendment rights by precluding his taking steps to secure a rehearing in the California Court of Appeal following determination of his appeal or a hearing in the California Supreme Court. This contention should not now be considered by this Court for the reasons set forth in Argument II, *supra*, and for the additional reason that the record is inadequate to permit a determination of the matter in Wade's favor without also engaging in more conjecture.

In Wade's case there is not the slightest hint that at the time of the proceedings on appeal either he or his counsel had any desire to prepare such petitions. Indeed, several years passed before Wade expressed any interest in exploring the validity of his custody. We are left to speculate, for example, as to what would have been the result had Wade timely expressed to the state appellate courts an interest in preparing pro se petitions for rehearing or hearing and had requested access to a copy of the record on appeal for this purpose. In *Burns v. Ohio*, 360 U.S. 252 (1959), it was held the rights articulated in *Griffin* precluded the State of Ohio from requiring a filing fee of an indigent in order for him to obtain a second but discretionary appeal which under state procedure followed an appeal as of right. Even though vital, this Court would never have considered the claims raised in the *Burns* case had Burns not made

an attempt to vindicate his rights under state law and had that attempt frustrated by his financial inability to pay the filing fee. Wade's failure to have requested access to the record on appeal for purposes of preparing pro se petitions for rehearing and hearing should deprive him of any standing to urge in this Court that California law was applied to him so as to deprive him of access to the record for these purposes.

Moreover, we cannot now assume that because Wade did not have his own personal copy of the record on appeal any petition for rehearing in the Court of Appeal or for hearing in the California Supreme Court was automatically precluded. At the time of the proceedings on appeal Wade had counsel and counsel in fact had access to the record on appeal. As we have noted above (fn. 8, *supra*), appellate counsel was not relieved prior to the date of issuance of the remittitur on October 17, 1961, well after the time within which any petitions for rehearing or hearing could have been filed (see fn. 9, *supra*). Accordingly, it would be proper for this Court to presume Wade's interests on rehearing or hearing were protected by the continuing services of appointed counsel who was in a position to knowledgeably determine whether the pursuit of such relief would be appropriate. See *Norvell v. Illinois,* 373 U.S. 420, 423, 424 (1963).

The record filed in this Court is inadequate to show a denial of Wade's appellate rights under the Constitution. Indeed, there is no indication of record of any attempt on the part of Wade to invoke during the proceedings on appeal any of his rights to access to records enforceable under California law. Accordingly, this Court should either reject Wade's claims or decline to entertain them on their merits.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the Court of Appeals should be affirmed.

Dated: San Francisco, California, August 15, 1969

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(Appendices Follow)

Appendix A

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

United States Constitution

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code—Title 28

§ 1254(1).

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

§ 2254(b).

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

§ 2255.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant

a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Supreme Court Rules

Rule 23.

1. The petition for writ of certiorari shall contain in the order here indicated—

(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court.

California Rules of Court

Rule 10(c).

[Use of copies] The additional copy of the record required by these rules shall be made available for the use

of the parties to the appeal in such manner as the judge, or the clerk under his direction, shall prescribe; provided that the parties may stipulate to its use, and in such event only the original need be filed with the clerk of the superior court.

Rule 24(a).

[When decisions become final] All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30 day period or any extension thereof, orders one or more additional periods of time not to exceed a total of 60 additional days. A decision of a Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. When a decision of a Court of Appeal is final as to said court, it is not thereafter subject to modification or rehearing by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification.

Rule 27(b).

[Time for filing petition] A party seeking a rehearing either in the Court of Appeal or in the Supreme Court must serve and file a petition therefor within 15 days after the filing of the decision.

Rule 28(b).

[Time for filing petition] A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of the transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of three copies of a printed petition or a petition prepared by other process of duplication in lieu of printing or one copy of a typewritten petition to the clerk of the Court of Appeal which rendered the decision. When such copies are delivered to the clerk of the Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the clerk of the proper Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court.

Rule 35(c).

[Certification] As soon as both the clerk's and reporter's transcripts are completed, the clerk shall deliver one copy to the defendant or his attorney and one copy to the district attorney, and note the dates of such deliveries on the original. When there are two or more appealing defend-

ants in a case in which a judgment of death has been rendered against one or more of the defendants, the clerk shall deliver a copy of both transcripts to each such defendant or his attorney. Promptly thereafter, and in no case longer than 25 days after the filing of the notice of appeal, unless an extension is granted pursuant to subdivision (d) of this rule, the clerk shall deliver the original transcripts to the judge for his approval. Unless a proposed correction is served and filed within five days after delivery of the original transcripts to the judge, the judge shall certify on the original that no objection was made thereto within the time allowed by law, and shall immediately redeliver the transcripts to the clerk. If a proposed correction is filed, the judge shall promptly determine the matter. After corrections have been made, the judge shall certify that all objections made thereto have been determined, and that the transcripts have been corrected in accordance with such determination, and shall redeliver the transcripts to the clerk. Where there are two or more appealing defendants represented by separate counsel in a case in which judgment of death has not been rendered against any defendant, the appellant's copy shall be made available for the use of the appellants in the manner provided in rule 10.

Appendix B

In the Court of Appeal of the State of California
Second Appellate District, Division Two

2 Crim. No. 7496

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
WILLIE WADE, JR.,
Defendant and Appellant.

CERTIFICATION

I, Clay Robbins, Jr., Clerk of the Court of Appeal for the Second Appellate District, do hereby certify the appellate docket in this case shows that:

1. Pursuant to the request of appellant, Willie Wade, Jr., for appointment of counsel, Burton Marks, Esq., was appointed on February 6, 1961 to represent appellant on his appeal;

2. Appellant's Opening Brief on appeal, signed by Burton Marks, was filed April 12, 1961 and Respondent's Brief was filed June 30, 1961;

3. On August 10, 1961 oral argument was waived and the cause submitted on the briefs;

4. The opinion of the Court of Appeal was filed August 17, 1961;

5. The remittitur issued October 17, 1961 and on October 18, 1961 Burton Marks, counsel for appellant, filed a request for fees;

6. There is no indication of record that either appellant or Mr. Marks requested the court to relieve Mr. Marks as counsel on appeal;

7. Mr. Marks was not relieved by the court as counsel on appeal prior to October 17, 1961 the date the remittitur was issued.

Dated: August 11, 1969

/s/ CLAY ROBBINS, JR.
Clay Robbins, Jr., Clerk

FILE COPY

FILED
OCT 11 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 55

WILLIE WADE, JR.,
Petitioner,

vs.

LAWRENCE E. WILSON, Warden, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MARSHALL L. SMALL
Morrison, Foerster, Holloway,
Clinton & Clark
Crocker Plaza
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Counsel for Petitioner

MELVIN R. GOLDMAN
ALEXANDER B. AIKMAN
Of Counsel

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 55

WILLIE WADE, JR.,

Petitioner,

vs.

LAWRENCE E. WILSON, Warden, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

1.

Respondents Have Advanced No Supportable Reasons for Denying Petitioner His Trial Transcript for Purposes of Collateral Review.

Distilled to its essence, respondents' response to petitioner's contention that he has a right to a transcript for collateral attack is an appeal to this Court to disregard the clear application of the Fourteenth Amendment to petitioner's case because of (1) the potential financial burdens on the State in making a transcript available, and

(2) the potentially disruptive effect on prison discipline. Respondents are arguing a case not before this Court. The circumstances here requiring access to a transcript are very narrow: Petitioner appealed his conviction, a trial transcript was prepared and is presently available and in the possession of the State, and a copy of the transcript was provided by the State to petitioner's co-defendant. It is neither necessary nor appropriate for this Court in this proceeding to consider a right to a transcript in collateral proceedings of a prisoner who never appealed his original conviction and for whom no trial transcript was ever prepared. Accordingly, the statistics cited by respondents at pages 16-17 of their brief are irrelevant for the purposes of this proceeding.[1]

With respect to the imagined problem of maintenance of prison discipline, if this be grounds for denying *petitioner* access to his existing trial transcript, it would equally be grounds for denying such access to *every prisoner,* regardless of whether he had a co-defendant or not, and regardless of whether he was furnished a copy of his transcript for direct appeal. Surely the State of California does not mean to contend that in order to maintain prison discipline it is necessary to preclude a prisoner after his conviction from seeing a copy of a trial transcript which has

[1] It should be kept in mind that in the overwhelming majority of the states the question presented here could not arise, since most state statutes or court rules draw no distinction between defendants tried singly and those tried with other defendants with respect to providing free transcripts to an indigent defendant for purposes of appeal in a felony case. Since the filing of petitioner's opening brief, Delaware and Oregon have advised counsel for petitioner that they administratively construe their statutes or court rules not to afford each co-defendant a copy of the trial transcript and Appendix B to petitioner's opening brief should be revised accordingly.

been furnished to him. If the prisoner who has already been furnished a copy of his transcript in connection with his direct appeal may subsequently peruse the same for the purposes of instituting collateral proceedings, there is no basis for denying a transcript to a prisoner such as petitioner in the name of prison discipline.

Respondents also attempt to draw a parallel between providing attorneys to initially brief and argue petitions for collateral relief and providing a transcript for collateral proceedings. The argument is obviously fallacious since a petition for collateral relief can be filed any number of times and the burden imposed by providing counsel each time is clear whereas copy of a trial transcript need be provided only once and is substantially less expensive than an attorney.

2.

The Appointment of Appellate Counsel for Petitioner in Connection With His Initial Appeal Was Not a Substitute for His Constitutional Right to His Trial Transcript.

Respondents contend that since petitioner was represented by court-appointed counsel in connection with the initial appeal of his conviction, he had the full "access" to his trial transcript which the Constitution requires be made available to him. Were that so, *Douglas* v. *California,* 372 U.S. 353, holding that counsel has to be provided an indigent defendant on appeal, would have overruled, or at least rendered moot, the line of transcript cases stemming from *Griffin* v. *Illinois,* 351 U.S. 12. Obviously, such was neither the intent nor the effect of *Douglas,* and this Court has never suggested that the mere existence of counsel is an adequate substitute for the right to a transcript.

Furthermore, the appointment of appellate counsel for petitioner could not, under the circumstances of the present case, in any event be considered as an adequate substitute for the furnishing to petitioner of his trial transcript. At the very outset of direct appellate review, and before appellate counsel was appointed, petitioner had no transcript or access thereto to make corrections in the transcript before it was certified as correct for purposes of appeal. The ability to review and correct a trial transcript is essential to the proper presentation of an appeal, and respondents have made no effort to argue otherwise. In addition, after his conviction was affirmed, petitioner had no opportunity to review his transcript and determine whether to petition for a rehearing or petition for hearing before the California Supreme Court.[2]

---

[2] Respondents sought in their brief to demonstrate that petitioner was actively represented by counsel until the time for filing such petitions had expired by supplying a certificate of the Clerk of the California Court of Appeal for the Second Appellate District to the effect that (i) there was no indication of record that the petitioner or his court-appointed counsel requested the court to relieve him as counsel on appeal, and (ii) that counsel was not in fact relieved by the court as counsel of record prior to the time the remittitur was issued. In view of such certification, it appears that petitioner's counsel was not formally relieved as counsel during the appellate process. However, under the circumstances, counsel for petitioner believes himself obligated to file as an appendix to this brief a statement as to certain correspondence of which he is aware by petitioner's court-appointed appellate counsel to the California Court of Appeal (1) requesting advice prior to briefing and argument of the case as to whether he should be relieved as counsel, and (2) indicating immediately after the decision was rendered and while there was adequate time to file petitions for rehearing or hearing before the California Supreme Court that such counsel had no intention of filing any such petitions.

3.

Petitioner Has Neither Waived His Claim to His Transcript Nor Been Remiss in Asserting His Claim Before the California Courts.

Respondents contend that petitioner waived his right to a copy of his trial transcript in at least two ways. First, respondents contend that petitioner never told the State of his desire for a transcript. The very fact that petitioner's counsel had to borrow a copy of the transcript from the Attorney General—the chief law enforcement officer of the State—put the State on notice of petitioner's lack of a transcript. At least from that point on, the State, and not the petitioner, had the burden to see that petitioner's constitutional rights were protected, and petitioner should not be charged with waiver of his rights.

Respondents' second argument for waiver is that the record lacks any indication that petitioner objected to not having his own copy of the trial transcript prior to 1965. "But nonassertion of a constitutional right in court proceedings in which it would be appropriate to make such assertion is not necessarily a waiver of such right. As appellee [Warden, San Quentin Prison, California] himself concedes, a consitutional question may be raised at any time if the matter appears on the face of the record, or if it is of such nature that it could not have been raised before. A matter is of such nature that it could not have been raised before if the person asserting it did not have knowledge of the facts upon which it is based, or if, for some other adequate reason, such person was prevented from asserting it." *Egan* v. *Teets,* 251 F.2d 571, 576 (9th Cir. 1957), *cert. den.* 352 U.S. 853. *See also, Preston* v. *Municipal Court,* 188 Cal.

App. 2d 76, 10 Cal. Rptr. 301, 304 (1961). It is submitted that under the circumstances of this case, particularly those reflected in the affidavit of counsel for petitioner attached hereto, the circumstances justify the petitioner not having raised the issue during his appeal. Cf. *Dowd* v. *Cook*, 340 U.S. 206.

Respondents also urge that petitioner has not raised the issue of the constitutional validity of rules 10(c) and 35 prior to his opening brief in this Court. The opposite, however, is the case. In petitioner's motion and affidavit for the issuance of records directed to the California Court of Appeal (A. 19), petitioner stated:

> "The Honorable courts jurisdiction to issue the records in this case is based in the facts that this court rendered it's decision in the above numbered case on August 17, 1961, Affirming the Los Angeles Superior Court order denying motion for new trial, thus petitioners timely notice of appeal gives him the right to there reporters transcript, further as petitioner is without funds to pay for such transcripts, they must be issued at the expense of the state, even though the ten day period for appeal has elapsed."

Then, in his Petition for a Writ of Habeas Corpus to the Supreme Court of California (A. 25), petitioner stated his allegation as follows: "Petitioner is at present being denied due process of law and equal protection of the law by the illegal restrainment of his trial records, by the People of the State of California." Petitioner then indicated that he wanted the court to issue records which specifically included "Records of the trial/reporters transcripts", and that he had no funds with which to pay the costs of securing

those records. Petitioner also stated that "A certified copy of the aforesaid records, were issued to the petitioners co-defendant Joe Lewis Pollard . . . " (A. 25).

Having exhausted his remedies in the state courts, petitioner then went to the Federal courts. In his petition for Writ of Habeas Corpus, petitioner says that his basic allegation is that he is being denied due process and equal protection of the law "by the restrainment of my records" (A. 10). In response to question 11, which asks him to set forth the facts which support his contention, he states: "The laws of California requires that an indigent person may receive a free copy of a trial transcripts if he timely appeals, i complied with the law and timely appeal my conviction but could recieve a free copy of the Records as an indigent person" (A. 5). See also, petitioner's "Traverse in Opposition to the Return to the Order to Show Cause and Argument Points and Authorities" (A. 40).

Finally, in his petition for certiorari, petitioner stated at the very outset of his argument:

> "Petitioner's case is rather unusal, in the respect that he filed a timely notice of appeal, which according to this Court's decision in *Griffin* v. *Illinois,* 351 U.S. 12, entitled him to a free copy of the trial transcripts if he is unable to pay for them.
>
> Under the Rules of Court in the State of California, Rule 10 (c) and 35 (c), provides that every convicted person of crime is entitled to a free transcript of the proceedings for purpose of appeal. It is provided that where two or more defendants are convicted in the same case and the judgment of death is not rendered, one free copy is made available to the defendants to share.

In the present case petitioner was convicted with one Joe Lewis Pollard, who also filed a notice of appeal, but prior to the records being filed in the Appellate Court dropped his appeal. It is alleged that the records were nonetheless forwarded to him. However, petitioner nor any one connected with his appeal has seem the records. At this time and all times prior to the filing of the opinion by the court of appeals, Mr. Pollard has never shared the records with petitioner, nor is he to petitioner's knowledge under any kind of order from the Court to share the records with petitioner ....

Rule 10 (c) and 35 (c) does not purport to hold that in all cases in which two are more defendants is jointly tried and convicted there is to be no more than one copy of the records made available irrespective of the ability to pay for them. This petitioner believes to be a practice of 'invidious discrimination' on the part of the State of California. Such a practice which this Honorable Court sought to strike down in *Griffin* vs. *Illinois*, supra; and *Hardy* v. *United States*, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed. 2d 331.

Petitioner believes, that had not the invidious discrimination then practice been subjected to petitioner, he would not now be filing this petition in this Honorable Court. That had he been furnished with a copy of the transcript at the time of his appeal, he would have had it for the purpose of filing his petition for a writ of habeas corpus, that he now seek the records to prepare" (pp. 6-8).

This Court has in the past recognized that prisoners acting as their own counsel are not to be held to the same standards as lawyers in preparing their petitions (see,

Price v. *Johnston*, 334 U.S. 266, 292). Certainly, petitioner has done all that can in good conscience be required of him in bringing to the attention of both the California courts, the lower Federal courts, and this Court his claim that he has been unconstitutionally denied his right to his trial transcript. Petitioner should not be required to make any further showing before a copy of his transcript is made available to him, failing which he should be discharged. See *Dowd* v. *Cook*, 340 U.S. 206, 210.

Respectfully submitted,

MARSHALL L. SMALL
Counsel for Petitioner

MELVIN R. GOLDMAN
ALEXANDER B. AIKMAN
Of Counsel

APPENDIX A

Affidavit of Marshall L. Small

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, *ss.*

MARSHALL L. SMALL, being first duly sworn, deposes and says that:

1. Attached hereto as Exhibit 1 is a copy of letter dated March 10, 1961, from Burton Marks, attorney at law, to the District Court of Appeal, Second Appellate District for the State of California, which copy was furnished to Affiant by Petitioner, Willie Wade, Jr. By letter dated September 3, 1969, the office of the Clerk of the California Court of Appeal for the Second Appellate District advised Affiant that the registar of actions shows the following entry: "MAR 21, 1961, Filed letter of Marks-to write brief for Wade only."

2. Attached hereto as Exhibit 2 is a copy of letter dated August 21, 1961, from Burton Marks, attorney at law, to the District Court of Appeal for the Second Appellate District for the State of California, which copy was furnished to Affiant by the office of the Clerk of the Court of Appeal for the First Appellate District in San Francisco, California, to which had been transmitted the transcript in the case of *People* v. *Wade, et al.*, for perusal by Affiant.

/s/ MARSHALL L. SMALL
Marshall L. Small

Subscribed and sworn to before me this 2nd day of October, 1969.

/s/ ELLEN M. SMITH
Notary Public
in and for the State of California
with principal office in the City
and County of San Francisco

[Notarial Seal]

My commission expires:
Feb. 14, 1972

EXHIBIT 1

BURTON MARKS
ATTORNEY AT LAW
GALE-WILSHIRE BUILDING
212 SOUTH GALE DRIVE
BEVERLY HILLS, CALIFORNIA

OLIVE 3-0211

March 10, 1961

District Court of Appeal
Second Appellate District
Division Two
State Building
Los Angeles, California

Re: *People* vs. *Pollard and Wade;* 2nd Crim. 7496

Gentlemen:

I was appointed by this Court to represent defendant Willie Wade, Jr. in his appeal to this Court, and was also asked to review the position of the co-defendant Joe Lewis Pollard.

The delay in presenting this letter to the Court resulted in counsel's inability to obtain the transcript from the defendants until last week.

I have carefully reviewed the record, and have come to the following conclusions, the reasons for which I will amplify:

1. Judge Drucker accorded both the defendants one of the most fair and impartial trials this counsel has had opportunity to observe. All objections and motions (save one, see infra) were resolved in favor of the defendants.

2. Both defendants were afforded excellent representation, insofar as this counsel can see, all favorable evidence on behalf of the defendants was presented.

3. The record is free from *reversible* error.

4. There *may* be legal error in the refusal of the Court to give an instruction as to second degree murder, but as will be seen further on, this error in a very practical sense would not seem to have prejudiced the defendants except for the length of time of their parole if parole is granted in the future.

Counsel respectfully requests this Court in light of this letter to advise counsel whether or not he should prepare an Appellant's Opening Brief, or be relieved as counsel for the defendants.

Analysis of the Case

The encapsulated facts most favorable to support the judgment are as follows:

On October 16, 1959, Kenneth Albert Swift, Deceased, attended a lathers union meeting at Third and Bixel Street in downtown Los Angeles. After the meeting, in the company of several friends, he had some drinks at a couple of downtown bars. He then went to a place known as the B & B or B & E Cafe on Central Avenue with three or four of his companions, with the apparent intention of locating some female companionship for the night.

Mr. Swift met the defendant Wade at the Central Avenue establishment between 12:00 and 1:00 A.M. on the 17th. Mr. Swift then left the B & B Bar in the company of Mr. Wade, and Mr. Swift drove down to Compton Avenue to a liquor store in the Compton area. They were followed by Joe Ray Tipton, a friend of Mr. Swift's.

Tipton and Swift conversed together for a short time, while Wade went into a house across the street and into a beer joint. Mr. Tipton, shortly after, told Mr. Swift that he was going home (this appears to have been shortly be-

fore 2:00 A.M. since the bars were still open). This was the last time that Mr. Tipton saw Mr. Swift alive.

At about 11:00 o'clock in the morning of October 17, 1959, sheriff's deputies discovered Mr. Swift's body lying in a vacant field at the dead end of 148th Street in the Compton area. The body showed signs of bad beating. All identification and personal items had been removed from the pockets, and the shoes were missing. Testimony of the coroner's office indicated that death had resulted from the beatings. It also showed a blood-alcohol index of .26, indicating a high degree of intoxication on the part of Mr. Swift prior to his demise. Mr. Swift's automobile was found in the Compton area a few blocks away from an address at 2702 Lantana Street, which is the scene of some additional evidence concerning the defendants.

Persons at that residence testified that the defendants Wade and Pollard arrived at the Lantana address at about 8:00 o'clock the morning of the 17th. Mr. Wade had blood on his trousers, and they were washed off. There was also testimony to the effect that Mr. Wade and Mr. Pollard indicated that they had just killed or beaten someone and had taken his car.

The sheriff's deputies testified to conversations had with the defendants where certain admissions were made by both defendants as to their presence at the field. Mr. Pollard stating that he had led the group onto the filed, but that Mr. Wade had inflicted the beatings. There was some question as to the voluntary nature of these admissions or confessions, but obviously this fact was resolved in favor of the prosecution upon submission to the jury.

The defense of both defendants was alibi. Pollard denied having been with Wade at all during the evening or morning of the 17th. Mr. Wade denying that he had been with Mr. Swift after leaving the liquor store on Compton Boulevard.

The jury returned a verdict of first degree murder against both defendants, and after a second hearing on punishment, a recommended life imprisonment for Mr. Pollard and the death sentence for defendant Wade. At

the motion for new trial, pursuant to the provisions of §1181 of the Penal Code, the death sentence of Mr. Wade was reduced to life imprisonment by the trial court.

It should be noted here that two questions were presented by the defendant Wade just prior to the hearing of the motion for a new trial (R.T. 712 et seq.), first being a request for removal of his counsel Mr. Rosen, and the second that he was deprived of due process of law and that he, the defendant Wade, was not prosecuted by an indictment, citing California Constitution Article I, Section 8 and the Fifth Amendment of the United States Constitution.

As previously pointed out and amplified by the court, Wade's counsel Mr. Rosen was highly competent, and had given Mr. Wade every possible defense. Furthermore, it was through the argument and research of Mr. Rosen that certain facts were pointed out to the court which convinced the court that Mr. Wade should have his sentence reduced to life imprisonment because of a probable defective intelligence and reasoning.

As to the second argument, prosecution upon information instead of indictment does not violate the Constitution of the United States, and the United States Constitution, Amendment V relates only to proceedings in the courts of the United States.

People vs. *Hurtado* (1883), 2 C.U. 206, 12 P.C.L.J. 106;
People vs. *Wallach* (1926), 79 Cal. App. 605, 250 P. 578.

The most serious contention of the defendants that can be raised on appeal is the failure of the court to give an instruction on second degree murder, which was argued at the motion for a new trial (R.T. p. 732, et seq.).

The theory of the defense is that a defendant is entitled to inconsistent defenses of alibi and murder arising out of an assault instead of robbery. Cf. *People* vs. *Conte,* 17 Cal. App. 771, 122 P. 450.

Further, it is error to deny a defendant a reasonable theory of defense. Cf. *People* vs. *Matlock,* 336 P. 2d 505.

In the instant case, it was the People's contention that the defendants committed murder in the perpetration of robbery. The defense wanted to argue that even though a robbery may have been committed, that the murder was not committed in perpetration thereof; that perhaps the idea of robbery or theft occurred afterwards in point of time or that the murder had occurred in the course of an unlawful assault without any intent to rob.

Of course, where there is overwhelming evidence of the crime of murder or it being perpetrated in the course of a robbery, it is not error to refuse an instruction defining the degrees of murder. *People* vs. *Williams,* 174 Cal. App. 2d 364, 345 P. 2d 763 (Robbery-murder case).

People vs. *Dorman,* 28 Cal. 2d 846, 172 P. 2d 686 (Robbery-murder case);

People vs. *Riser,* 47 Cal. 2d 566, 305 P. 2d 1 (Robbery-murder case).

As a practical matter in the instant case, if the jury were given instructions as to second degree murder, and counsel for defendants were allowed to argue the fact of doubt as to how and in what manner the murder was committed, the jury may have brought in a verdict of second degree murder.

The practical effect of the difference in the verdicts and sentences is that second degree murder carries a term of five years to life, whereas the present sentences imposed are life imprisonment. In the first instance, the adult authority could grant parole to the defendants prior to the mandatory seven years required in a life sentence. Further, it is absolutely certain that the term of imprisonment as to both defendants would be fixed at "life" as is the mandatory sentence herein imposed.

Although the error pointed out by this counsel may be a substantial one, it is not the type of error that would require a reversal since the evidence is substantial in supporting a conviction of murder in some degree.

This court, on appeal, has authority under Section 1181 and 1260 of the Penal Code to modify a judgment of murder in the first degree by reducing the degree of the crime to murder in the second degree. It has been stated that such authority should only be exercised where evidence fails to support a judgment of murder in the first degree.

People vs. *Cartwright,* 147 Cal. App. 2d 263, 305 P. 2d 93.

For the reasons above stated, counsel respectfully requests instructions from this court as to the necessity of filing Appellant's Opening Brief, or whether the writer should be relieved as counsel for the appellants.

Very truly yours,

BURTON MARKS

BM:SL

cc: Attorney General's Office
Willie Wade, Jr.
Joe Lewis Pollard

EXHIBIT 2

BURTON MARKS
ATTORNEY AT LAW
GALE-WILSHIRE BUILDING
212 SOUTH GALE DRIVE
BEVERLY HILLS, CALIFORNIA

OLIVE 3-0211

August 21, 1961

District Court of Appeal
Second Appellate District
Division 2
State Building
Los Angeles 12, California

Re: *People* vs. *Willie Wade, Jr., etc.*
2nd Crim. No. 7496

Gentlemen:

On February 6, 1961, I was appointed as counsel to represent the appellant Willie Wade, Jr. on his appeal.

On March 10, 1961, I addressed a lengthy letter to the court, reviewing the instant case, and informing this Court that in my opinion there was no reversible error, and requesting advice as to whether counsel should continue as attorney for the appellant and prepare an opening brief or be relieved as counsel for the appellant. Shortly, thereafter, I received a telephonic communication from your Clerk, advising me that the Court desired that an Appellant's Opening Brief be filed.

I estimate that I spent approximately 20 to 25 hours in preparing the appeal. This includes the research done on the matter set forth in the letter of March 10, 1961.

I respectfully request that this Court give me reasonable compensation for the time and effort expended. I do not contemplate that there will be any petitions for rehearing nor any petitions for hearing in the Supreme Court.

Thank you for my appointment, and I hope that I may be of further service to this Court in the future.

Very truly yours,

/s/ B. Marks
Burton Marks

BM:sl

[Stamp—Dist. Court of Appeal, Second Dist., Filed Oct. 18, 1961, J. E. Brown, Clerk]

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 55.—October Term, 1969

Willie Wade, Jr., Petitioner, *v.* Lawrence E. Wilson, Warden, et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 13, 1970]

Mr. Justice Brennan delivered the opinion of the Court.

In 1961, petitioner and one Pollard appealed to the California District Court of Appeal from murder convictions upon which the California Superior Court had sentenced each of them to life imprisonment. California Rules of Court 35 (c) and 10 (c) required that the appellants be furnished with one free copy of the trial transcript to be shared by them for the purposes of the appeal. Pollard received the free copy but would not share it with petitioner. However, the State Attorney General loaned petitioner's appellate counsel his copy. The District Court of Appeal affirmed the convictions, 194 Cal. App. 2d 830, 15 Cal. Rptr. 214 (1961).

Five years later, in 1966, petitioner wished to pursue a collateral remedy and sought the transcript from Pollard but Pollard "refused to communicate on the subject." Petitioner's inquiry of his appellate lawyer elicited the response that the copy borrowed from the Attorney General had been returned. Petitioner then turned to the California courts seeking, however, not temporary use of a copy but to be furnished with a copy of his own. He applied initially to the trial court and was advised that the original of the transcript was in the District Court of Appeal. He thereupon filed a *pro se* motion for a copy in the District

Court of Appeal, which motion was denied on the ground that the Court of Appeal had only the original and was not equipped to duplicate copies. He next filed a proceeding in the California Supreme Court and was advised by the clerk of that court that he must proceed in "the court possessed of the original record."[1] He renewed his application to the District Court of Appeal, which again denied it on the ground that that court had "no facility for reproducing records"; but this time petitioner was advised that the original record would be made available for copying at his expense. Petitioner then abandoned further efforts in the California courts.

In 1967, he filed the instant federal habeas corpus proceedings in the District Court for the Northern District of California. His petition alleged his indigency and the single claim that California's refusal to furnish him without cost his own copy of the transcript denied him due process and equal protection of the laws in violation of the Fourteenth Amendment. The District Court after hearing granted the writ and ordered California either to provide the free transcript or to release the petitioner. The District Court stated in an unreported opinion, ". . . although there is no square holding on the question of the right to a transcript in preparing a petition for a writ of habeas corpus rather than appeal, the logic of the Supreme Court holdings compels a finding that such a right exists."[2] The Court of Appeals for the Ninth

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[1] Petitioner styled his application to the Supreme Court of California "A Petition for a Writ of Habeas Corpus" but the only relief he requested was issuance of the record in his case or an order to the District Court of Appeal to furnish him with the record. He did not request an order releasing him from custody.

[2] The District Court cited *Smith* v. *Bennett*, 365 U. S. 708 (1961) (habeas corpus filing fee); *Griffin* v. *Illinois*, 351 U. S. 12 (1956) (transcript on direct appeal); *Lane* v. *Brown*, 372 U. S. 477 (1963) (transcript on post-conviction appeal); *Long* v. *District Court*,

Circuit reversed on the ground that ". . . the trial court failed to find that Wade was claiming that there was any error which occurred in the proceedings which led to his conviction which would warrant granting of post-conviction relief . . . . Wade was not entitled to demand a transcript merely to enable him to comb the record in the hope of discovering some flaw." 390 F. 2d 632, at 634 (1968). We granted certiorari. 393 U. S. 1079 (1969).

The California Rules require that a free transcript be furnished to convicted persons separately tried in felony cases and to each co-defendant where one or more co-defendants are under sentence of death.[3] Petitioner argues that in furnishing only one copy to be shared by co-defendants where none received the death penalty California interposes an unconstitutional barrier to the use of its criminal appellate proceedings and that the

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385 U. S. 192 (1966) (transcript on post-conviction appeal). See also *Roberts* v. *LaVallee*, 389 U. S. 40 (1967); *Gardner* v. *California*, 393 U. S. 367 (1969).

[3] Rules 35 (c) and 10 (c) provide in pertinent part:

Rule 35 (c): "As soon as both the clerk's and reporter's transcripts are completed, the clerk shall deliver one copy to the defendant or his attorney and one copy to the district attorney . . . . When there are two or more appealing defendants in a case in which a judgment of death has been rendered against one or more of the defendants, the clerk shall deliver a copy of both transcripts to each such defendant or his attorney. . . . Where there are two or more appealing defendants represented by separate counsel in a case in which judgment of death has not been rendered against any defendant, the appellant's copy shall be made available for the use of the appellants in the manner provided in rule 10."

Rule 10 (c): "The additional copy of the record required by these rules shall be made available for the use of the parties to the appeal in such manner as the judge, or the clerk under his direction, shall prescribe; provided that the parties may stipulate to its use, and in such event only the original need be filed with the clerk of the superior court."

distinction made by the Rules, without more, establishes that California has denied him equal protection of the laws. But petitioner will not be heard to attack the Rules since they concern only the furnishing of transcripts for purposes of direct appeal and he and his appellate counsel in fact had the use on his direct appeal of the transcript borrowed from the State Attorney General and did not complain that the terms on which it was made available in any way impaired its effective use on the appeal. See *United States* v. *Raines*, 362 U. S. 17, 21–22 (1960).

Petitioner argues that in any event, contrary to the Court of Appeals, the District Court was correct in holding that because "it may not be possible to pinpoint . . . alleged errors in the absence of a transcript," petitioner was entitled to a transcript for use in petitioning for habeas corpus even though he did not specify what errors he claimed in his conviction. To pass on this contention at this time would necessitate our decision whether there are circumstances in which the Constitution requires that a State furnish an indigent state prisoner free of cost a trial transcript to aid him to prepare a petition for collateral relief. This is a question of first impression which need not be reached at this stage of the case. Notwithstanding petitioner's success in borrowing a copy of the transcript in connection with his direct appeal, his insistence in the subsequent proceedings in both the California and federal courts is that he has a constitutional right to a copy of his own. We think consideration of that contention should be postponed until it appears that petitioner cannot again borrow a copy from the state authorities, or successfully apply to the California courts to direct his codefendant, Pollard, or some other custodian of a copy to make a copy available to him. Cf. Rule 10 (c). Without such a showing, or a showing that having his own copy would

be significantly more advantageous than obtaining the use of someone else's copy, the District Court should not have reached the merits of petitioner's claim. We think, however, that the case should be retained on the District Court's docket pending petitioner's efforts to obtain access to the original or a copy. Upon being advised by the parties that petitioner has been provided such access, the court should dismiss the action. We vacate the judgments of both the Court of Appeals and the District Court and remand to the District Court for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 55.—October Term, 1969

Willie Wade, Jr., Petitioner, *v.* Lawrence E. Wilson, Warden, et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 13, 1970]

Mr. Justice Black, dissenting.

Petitioner and one Joe Pollard were convicted of murder in 1960 and sentenced to life imprisonment. Pollard received a trial transcript and when he refused to turn it over to petitioner for his use in preparing an appeal, the State Attorney General's Office loaned a copy to petitioner's appellate counsel. The California District Court of Appeal affirmed in 1961. 194 Cal. App. 2d 830, 15 Cal. Rptr. 214. Five years later, in 1966, petitioner tried in the state courts to obtain a trial transcript. Failing there, he filed a petition in the United States District Court for the Northern District of California in 1967 asking to be released because of the State's refusal to provide him a copy of the transcript. The United States District Court held petitioner was entitled to a copy of the trial record but the United States Court of Appeals reversed, holding that since petitioner did not allege any trial error which might warrant post-conviction relief he was "not entitled to demand a transcript merely to enable him to comb the record in the hope of discovering some flaw." 390 F. 2d 632, 634 (1968).

This Court today says the petitioner thus raises a constitutional question of first impression "whether there are circumstances in which the Constitution requires that a State furnish an indigent state prisoner free of

cost a trial transcript to aid him to prepare a petition for collateral relief." *Ante*, at 4. It may be conceivable that the Constitution would under certain special circumstances impose this duty on the State when it has such a record in its possession, but I cannot agree that anything shown in this record presents those special circumstances.

It is now over nine years since this case was tried. At petitioner's request a trial record was made available for him to take an appeal; eight years ago he took that appeal and lost. There certainly is no constitutional requirement that a State must continue to supply convicted defendants trial records to enable them to raise the same old challenges to their convictions again, and again, and again. There is not a word nor a suggestion in the whole record in this case that demonstrates or even intimates that any new events have occurred since petitioner's 1961 appeal which could under any possible circumstances justify even a shadowy argument that petitioner was not guilty of the murder he was convicted of having committed. Although more than eight years have passed since that appeal, I would join in granting relief to this petitioner if he had shown, or even given any reason to believe, that new circumstances now indicate he was wrongfully convicted of a crime of which he was not guilty. See *Fay* v. *Noia*, 372 U. S. 391 (1963); cf. *Kaufman* v. *United States*, 394 U. S. 217, 231 (BLACK, J., dissenting (1969)); *Harris* v. *Nelson*, 394 U. S. 286, 301 (BLACK, J., dissenting (1969)). But we have no such case here. Petitioner has not raised any claims which indicate in the slightest that he has been convicted of a crime of which he is innocent. At the most he has asserted a desire to review the record to find some technical legal point which he can argue to a court as a basis for release from confinement. He has already had one chance to make such arguments on direct appeal,

and he lost that battle. I do not think he needs a transcript to know whether he was convicted erroneously or whether some new circumstances have arisen that now show a fatal constitutional error in the prior proceedings. In any event he has not yet based his request for a transcript on any indication of such a need. In such circumstances I see no reason whatsoever for the State to have to obtain a copy for him. This case is but another of the multitudinous instances in which courts are asked interminably to hash and rehash points that have already been determined after full deliberation and review. One considered appeal is enough, in the absence of factors which show a possibility that a substantial injustice has been inflicted on the defendant.

Nothing in this petitioner's application for certiorari or his briefs and arguments gave any indication that he might be entitled to post-conviction relief, and there is thus no reason why this Court should even have reviewed his case. I would dismiss this writ as being improvidently granted.